Petition

Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

81-345

NO_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BRIGHT McCAUSLAND, Petitioner

v.

MASON COUNTY BOARD OF EDUCATION, a corporation; HARRY SIDERS, individually and as President of said corporation; BILL BRADY and ROBERT ADKINS, individually and together with Harry Siders constituting a majority of said Board of Education; DONALD C. KINGERY, ESQ., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and WALTER VILLARS and NELLIE PRESTON,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. May the Fourth Circuit Court of Appeals apply the two-year West Virginia "personal injury" tort statute of limitations to bar Petitioner's civil rights action based upon his state-created and required written contract of public employment, attached to his complaint and made a part thereof, despite the repeated and current holdings of the Supreme Court of Appeals of West Virginia mandating that the contract statute of limitations (10 years for written contract) be applied in such cases ?

2. May the Fourth Circuit Court of Appeals apply its <u>own</u> ad hoc rule declaring that ALL civil rights actions brought under Sec. 1983 are actions for "personal injuries", contrary to the holdings of the Supreme Court, and in disregard of the Rules of Decision Act of Congress of

June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. Sec. 1652, the Proceedings in Vindication of Civil Rights Act of Congress of October 19, 1976, Pub.L. 94-559, Sec. 2, 90 Stat. 2641, 42 U.S.C.A. Sec. 1988, and the law of West Virginia ?

3. Where the Supreme Court has heretofore approved application of the Fourth Circuit Court's ad hoc "rule" in Virginia non-contract civil rights cases thereby liberalizing a one-year state bar, where no Virginia law or decision was shown to guide the Court in analogous cases, may the Fourth Circuit Court of Appeals construe such affirmation by the Supreme Court as authority to apply the said ad hoc "rule" as to West Virginia civil rights cases, where the Supreme Court of Appeals therein has repeatedly held that even " a complaint that could be construed as being in tort or on contract will be presumed to be on contract whenever the action would be

barred by the statute of limitations if construed as being in tort" ?

4. Is not the national-state policy of Federalism violated by the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit ?

5. May the Fourth Circuit Court of Appeals establish a new and higher requirement for pleading a civil rights cause based on a written public employment contract, making it now necessary that the plaintiff "demonstrate the required constitutional basis for his federal complaint" by alleging therein "personal injury transcending contract rights" without authority from an Act of Congress or directive from the Supreme Court as required by the Act of Congress of November 6, 1966, P.L. 89-773, Sec.1, 80 Stat. 1323, 28 U.S. C.A. Sec. 2072.?

6. May the Fourth Circuit Court of Appeals, by stating tha " McCausland had and still may have a cause of action on

his contract in the state courts" chill the right of filing civil rights actions in the United States Courts ?

7. Where the notice of appeal to the United States Court of Appeals for the Fourth Circuit in the within matter was confined to the District Court's application of the West Virginia two-year "personal injury" tort limitations statute as that Court felt was required under the ad hoc Court of Appeals "rule", could the Court of Appeals find the complaint to be insufficient for federal purposes contrary to the express finding of sufficiency thereof by the District Court, which finding was not appealed and where no jurisdictional question was raised therein ?

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Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment and

Opinion of the United States Court of Appeals For The Fourth Circuit, decided on May 27, 1981, affirming dismissal of Petitioner's civil rights complaint and action based upon his state-created written public employment contract, as barred by the two-year "personal injury" tort statute of limitations of West Virginia.

OPINIONS BELOW

The Opinion of the United States Court of Appeals For The Fourth Circuit is reported in 649 F.2d 278 (4th Cir. 1981) and a copy thereof is appended to this Petition (App. 2, p.52). A copy of the Judgment of the Court of Appeals is appended to this Petition (App. 1, p.50). The Memorandum Order and Judgment of the United States District Court For The Southern District of West Virginia, at Civil Action Number 78-3375, entered August 13, 1980, are not

reported. The said Judgment of the District Court is appended to this Petition (App.3, p. 57); and the Memorandum Order thereof is appended hereto (App.4, p.59).

JURISDICTION

Jurisdiction herein is invoked under 28 U.S.C. Sec.1254 (1) and Rule 17 (1) (a) and (1)(c) of the Supreme Court Rules.

The Opinion and Judgment of the Court of Appeals for the Fourth Circuit were filed on May 27, 1981.

Request for Certification and Transmission of the Record, pursuant to the revised Rule 19 (1) of the Supreme Court was made by mail to the Clerk of the United States Court of Appeals For The Fourth Circuit, and also to the Clerk of the United States District Court, on August 6, 1981.

Jurisdiction of the District Court

was invoked under the Civil Rights Acts of 1866 and April 20, 1871, 42 U.S.C 1981, 1982, 1983, 1985 and 1986; the First, Fourth, Fifth, Tenth and Fourteenth Amendments to the United States Constitution; Art. 1 Sec. 10, cl. 1, the Contract Clause; rights of due process, equal protection and non-discriminatory application of the laws; his federally guaranteed liberty interest; violation of his state statutory rights of continued employment and due process; and 28 U.S.C. Sections 1331 (a) and 1343 giving him the right to sue for violation of his said rights.

The last date for filing of this Petition is August 25, 1981.

QUESTIONS INVOLVED

1. May the Fourth Circuit Court of Appeals apply the West Virginia two-year "personal injury" tort statute of limitations to bar Petitioner's civil rights action based upon his state-created and

required written contract of public employment, attached to his complaint and made a part thereof, despite the repeated and current holdings of the Supreme Court of Appeals of West Virginia mandating that the contract statute of limitations (10 years for written contract) be applied in such cases?

2. May the Fourth Circuit Court of Appeals apply its own ad hoc rule declaring that ALL civil rights actions brought under 42 U.S.C. Section 1983 are actions for "personal injuries", contrary to the holdings of the Supreme Court, and in disregard of the Rules of Decision Act of Congress of June 25, 1948, c.646, 62 Stat. 944, 28 U.S.C., Judicial Procedure, Sec. 1652, the Proceedings in Vindication of Civil Rights Act of Congress of October 19, 1976, Pub. L. 94-559, Sec. 2, 90 Stat. 2641, 42 U.S.C.A. Sec. 1988, and the law of West Virginia?

3. Where the Supreme Court has heretofore approved application of the Fourth Circuit Court's ad hoc "rule" in Virginia non-contract civil rights cases thereby liberalizing a one-year state bar, where no Virginia law or decision was shown to guide the Court in analogous cases, may the Fourth Circuit Court of Appeals construe such affirmation by the Supreme Court as authority to apply the said ad hoc "rule" as to West Virginia civil rights cases, where the Supreme Court of Appeals therein has repeatedly held that even " a complaint that could be construed as being either in tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limitations if construed as being in tort" ?

4. Is not the national-state policy of Federalism violated by the Opinion and Judgment of the United States Court of

Appeals for the Fourth Circuit?

5. May the Fourth Circuit Court of Appeals establish a new and higher requirement for pleading a civil rights cause based on a written public employment contract, making it now necessary that the plaintiff "demonstrate the required constitutional basis for his federal complaint" by alleging therein "personal injury transcending contract rights", without authority from an Act of Congress or directive from the Supreme Court as required by the Act of Congress of November 6, 1966, P.L. 89-773, Sec. 1, 80 Stat. 1323, 28 U.S.C.A. Sec. 2072?

6. May the Fourth Circuit Court of Appeals, by stating that " McCausland had and may still have a cause of action on his contract in the state courts" chill the right of filing civil rights actions in the United States Courts?

7. Where the notice of appeal to the

United States Court of Appeals For The Fourth Circuit in the within matter was confined to the District Court's application of the West Virginia two-year "personal injury" tort limitations statute as that Court felt was required under the ad hoc Court of Appeals "rule", could the Court of Appeals find the complaint to be insufficient for federal purposes contrary to the express finding of sufficiency thereof by the District Court, which finding was not appealed and where no jurisdictional question was raised therein?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this case are Art.1, Sec. 10, cl. 1 Contract Clause of the Constitution of the United States, the First, Fourth, Fifth, Tenth and Fourteenth Amendments thereto, and Petitioner's Liberty interest implicit therein.

STATEMENT OF THE CASE

By state-prepared and required written contract, as "prescribed by the state superintendent of schools" of West Virginia, Petitioner, Bright McCausland, having been formally state certified as a qualified public school principal therein, was, on july 27, 1972, employed by the Mason County Board of Education for an initial term of 3 years, and was assigned to Hannan High School in said County, where he continued to serve until September 1, 1973. On the latter date a sham "hearing", pre-planned secretly by the respondents for the purpose of dismissing Petitioner and replacing him by a relative by marriage and friend of defendant Walter Villars, on framed and false "charges", was staged, and forthwith upon the conclusion thereof, Petitioner was dismissed; further, the controlling 3 members of the school Board who planned with Villars and Preston to effect the removal of Peti-

ioner, declared that: "the contract entered into between the Board of Education and the respondent, Bright McCausland in 1972 be declared void effective as of this date, September 1, 1973".

Under the School Code of West Virginia Petitioner was assured continuity of employment, subject to specified statutory causes for termination, but granting him full due process rights in such event.

Petitioner promptly appealed from the Board's order of dismissal to the State Superintendent of Schools, as provided by the state school code. On April 4, 1974, the Superintendent filed a comprehensive opinion, wherein he criticized the Board's proceedings and dismissal order as being "arbitrary and capricious", and simultaneously ordered that Petitioner be reinstated to his position with full back pay. He was not reinstated. The Board instead sought review by petition for certiorari to the Circuit Court of Mason County.

That Court refused to issue a writ of certiorari on the ground that it lacked jurisdiction for doing so; whereupon the Board sought and obtained review by the Supreme Court of Appeals, which held that the Circuit Court did in fact have jurisdiction in the matter, and remanded the case thereto. The said Circuit Court set and held a preliminary hearing on August 29, 1977.

At the time of filing the within action in the United States District Court for the Southern District of West Virginia at Civil Action No. 78-3375 on December 7, 1978, the Circuit Court of Mason County had not yet handed down its opinion or judgment. Thereafter, upon review on certiorari to the Supreme Court of Appeals from an adverse judgment in the state circuit court, on September 23, 1980, the Supreme Court of Appeals did, at 274 S.E.2d 435 (App.5, p. 75), upon its finding that

Petitioner had been denied due process as provided in the school code, ordered him to be reinstated to his position with back pay. Petitioner was finally returned to his position as principal of Hannan High School in July, 1981, just 6 weeks short of 8 years from the time of his unlawful discharge. During the period of his unemployment, Petitioner was prevented from obtaining similar employment in the school system, due to his stigmatization by the false charges and findings of "intemperance","cruelty" and "wilful disobedience" by a majority of the Mason County Board of Education; further, he was barred from participating in professional educational societies, and lost other advantageous relationships in his community.

All of the foregoing facts, with the exception of the September, 1980 judgment of the Supreme Court of Appeals of West Virginia, are averred in the complaint.

The within civil rights action was filed on December 7, 1978, for the purpose of supplementing the remedies not available under the school code procedures.

A copy of the complaint and contract attached thereto is appended to this Petition (App.6, p. 87).

Only defendant Kingery filed an answer to the complaint, raising affirmative defenses of absolute immunity, insufficiency of the complaint, and the bar of the statute of limitations. All of the defendants moved to dismiss the complaint on the alleged insufficiency of the complaint, and the bar of the two-year "personal injury" tort statute of limitations. The Board and its 3 named defendant members also claimed absolute immunity.

On August 13, 1980, the District Court filed a Memorandum Order and simultaneously filed the Judgment of dismissal of the action. In the Memorandum Order the Court reviewed all of the motions for dismissal, and

specifically denied all motions claiming absolute immunity; and as to the insufficiency of the complaint, the Court not only denied all motions on that ground, but said: "the Court finds the complaint adequately to state a cause of action against the defendants, and defendants' motion to dismiss based on plaintiff's failure to allege a cause of action are therefore denied." As to the bar of the "personal injury" tort statute of limitations, the District Court cited the decision of the Fourth Circuit Court of Appeals in Almond v. Kent, 459 F.2d 200 (4th Cir. 1972, and other Fourth Circuit cases wherein the Court of Appeals declared that all Section 1983 civil rights actions are "in a broad sense" actions for personal injuries, requiring the state personal injury statute of limitations to apply. It followed the direction of the Circuit Court of Appeals.

Although the complaint alleged that the violations complained of were of a continuing nature, to the date of the filing of the complaint, Petitioner was not afforded opportunity for discovery, and, without any hearing being had, the learned District Court commented: "It would strain the imagination of this Court to find the acts of the defendants to be of a continuous nature", and ordered "that this action be, and the same hereby is, dismissed and retired from the Court's docket."

The notice of appeal filed by the Petitioner to the Fourth Circuit Court of Appeals was restricted to the Judgment of Dismissal on the stated ground of the application of the West Virginia "personal injury" two-year tort statute of limitations. No appeal was filed concerning the District Court's Order denying all defense motions raising the defense of insufficiency of the complaint. Said Notice of

the Appeal was filed September 9, 1980. Argument was held April 8, 1981; and the Opinion and Judgment affirming the District Court's Judgment of dismissal of the action was filed May 27, 1981 by the Court of Appeals.

On August 6, 1981 Request for Certification and transmission of the record to the Clerk of the Supreme Court was mailed to the Clerk of the United States Court of Appeals for the Fourth Circuit, and to the Clerk of the United States District Court for the Southern District of West Virginia, pursuant to Amended Rule 19 (1) of the Rules of the Supreme Court.

REASONS FOR ALLOWANCE OF THE WRIT

1. The National-State Policy of Federalism had its beginnings before the adoption of the Constitution. The original colonies did not delegate to either the Con-

tinental Congress under the Articles of Confederation, or to the Federal Congress under the Constitution, any power to alter or change the law of contracts, or to oust the state courts or legislatures of their exclusive power to determine such matters within the respective states, except that specific powers to regulate commerce among the states, with foreign states and with indian tribes were conferred upon the Congress; Wuebker v. James, 58 NYS 2d 671 (Misc. 1944).

By the Tenth Amendment to the Constitution, the still skeptical state delegates intended to insure that only those specific powers granted to the Federal government by the Constitution would set the ever clear parameters of the central government, and prevent the accretion of autocratic authority therein, such as that which was in fact espoused by Alexander Hamilton, John Adams and others,

of that era. In a memorable span of only 26 years, between 1809 and 1835, the Supreme Court under Chief Justice John Marshall, by upholding the "implied powers" implicit in Art.I Sec.8 cl.18-the Necessary and Proper Clause, set the course for expansion of the central government's burgeoning power for the next century and a half; Fletcher v. Peck, 6 Cranch 87 (1810); McCulloch v. Maryland, 4 Wheaton, 316 (1819); Gibbons v. Ogden, 9 Wheaton 1 (1824); Commw. of Penna. v. Nelson, 350 U.S. 415 (1956).

It was also the Supreme Court, in co-operation with Congress, which, despite the almost forgotten "reservation of power" in the States in the Tenth Amendment, that has kept the policy of Federalism viable. In no area of jurisprudence has the partnership of nation and state shown the nutuality of comity as in the Congressional faith in state judiciaries and legislatures.The remarkable Reconstruction Period Congresses demonstrated their faith in

the Policy of Federalism in omitting from the Civil Rights Acts of 1866 and 1871 a built-in statute of limitations, thereby taking into the confidence of the national government the wisdom and integrity of the state legislators and judges. Some case references have referred to that omission as a "deficiency"; but, had it been such, a hundred years of succeeding Congresses have not seen fit to "correct" it. On the contrary, by the Act of Congress of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. Sec. 1652, and more recently by the Act of Congress of October 19, 1976, P.L. 94-559, Sec. 2, 90 Stat. 2641, 42 U.S.C.A. Section 1988, the Congress has demonstrated its faith in the legislatures and courts of the states, by directing federal judges to implement Congressional statutory omissions by the laws of the states wherein the federal courts sit.

The Supreme Court has historically hon-

ored and enforced these Acts of Congress, and has recognized the wisdom thereof; Board of Regents, etc. v. Tomanio, 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct.1790 (1980); International Union, United Auto, etc.Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 701-703, 16 L.Ed.2d 192, 86 S.Ct.1107 (1966) wherein the Supreme Court recalls:

> " As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. McCluny v. Silliman, 3 Pet. 270, 277. In 1895, the question was re-examin another context, but the conclusion remained firm. Campbell v. Haverhill, 155 U.S. 610. Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. . . . . O'Sullivan v. Felix, 233 U.S.318 (1914) (Civil Rights Act of 1870) . . . ."

The Constitution of the United States, in Art.III Sec. 1 vests " the judicial power of the United States . . . in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". Even Congress may not deprive the Supreme Court of its judicial power; Stevenson v. Fain, (Tenn. 1904), 195 U.S. 167, 49 L.Ed. 142, 25 S.Ct. 6; Ex Parte Wisner, (Mo. 1906), 203 U.S. 449. 51 L.Ed. 264, 27 S.Ct. 150; U.S. v. Hudson, (Conn. 1812), 7 Cranch 32, 3 L.Ed. 259.

Far from intending to detract from the Supreme Court's Constitutionally granted power, the Congress, by its Act of November 6, 1966, P.L. 89-773, Sec. 1, 80 Stat. 1323, 28 U.S.C.A. 2072 delegates its own right to set the procedural rules of the federal court system to the Supreme Court. In Hanna v. Plumer, (Mass.1965), 380 U.S. 460, 14 L.Ed.2d 8, 85 S.Ct. 1136, the Supreme Court, in its turn, had acknowledged that under the Necessary and Proper

Clause in Art.I Sec. 8 of the Constitution Congress was indeed empowered to establish rules governing the practice, procedures and forms of pleadings in all federal courts.

Without express authority from Congress, however, even the Supreme Court cannot increase or diminish the jurisdiction of the Circuit Courts of Appeals, although it is empowered by Congress to regulate the exercise of such jurisdiction " in any manner not inconsistent with the laws of the United States "; Venner v Great Northern R.Co.,(N.Y. 1908), 209 U.S. 24, 52 L.Ed 666, 28 S.Ct.; Collins v. Boulton, (D.C. Ill. 1968) 287 F. Supp. 393.

The Supreme Court has realistically cautioned, in Occidental Life Ins. Co. v EEOC, 432 U.S.355,367, 53 L.Ed2d 402, 97 S.Ct.2447(1977) that:

> " State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal

> courts to assure that the importtation of state law will not frustrate or interfere with the implementation of national policies."

Without authorization from either Congress or the Supreme Court, the Fourth Circuit Court of Appeals has, in the within case applied its own elsewhere justified and approved ad hoc "rule" that " In the broad sense, every cause of action under Section 1983 which is well-founded results from "personal injuries.", and therefore the state "personal injury", two-year limitations statute bars even a civil rights action based on a state-created and required written employment contract, attached to and made part of the complaint. In doing so, the Court of Appeals ignored also the repeated holdings of the Supreme Court of Appeals of West Virginia requiring that in such cases the state's 10 year contract limitations statute is to be applied; Cochran v. Appalachian Power Co., 246 S.E.2d 624, (1978).

The Supreme Court, in Paul v. Davis, 424 U.S. 693, 701; 47 L.Ed.2d 405, 96 S.Ct. 1155, 1160 (1976), declared that the Civil Rights Acts were not intended to create " a body of general federal tort law "; they rather "create rights and obligations different from any which would exist at common law in the absence of a statute".

In applying state statutes of limitations in civil rights actions, the state's judicial interpretations of said statutes are also to be accepted, unless they are inconsistent with or in derogation of the federal law. As pointedly stated by the Supreme Court in Board of Regents etc. v. Tomanio, supra, 64 L.Ed.2d at pp. 447-448:

> " In Section 1988, Congress 'quite clearly instructs (federal courts) to refer to state statutes ' when federal law provides no rule of decision for actions brought under Sec. 1983. Robertson v. Wegmann, 436 U.S. 584, 96 S.Ct. 1991 (1978). See also Carlson v. Green,

> ____ U.S.____ at n. 10, 64 L. Ed. 2d 15, 100 S.Ct. 1468 (1980). As we held in Robertson, by its terms Sec. 1988 authorizes federal courts to disregard an otherwise applicable state rule only if the state law is "inconsistent with the Constitution and laws of the United States.". . . . . In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and the exceptions thereto, in the prosecution of a closely analogous claim "; Johnson v. Railway Express Agency, Inc., Id., at 464-464 44 L.Ed.2d 295, 95 S.Ct. 1716."

In Home Ins. Co. v. Dick, 281 U.S. 397, 409, 74 L.Ed.926, 50 S.Ct. 338 (1929), the Supreme Court also upheld the right of a state to extend the time limit within which suit may be brought, so long as such action did not violate the written contract of the parties; thus not only honoring the Policy of Federalism, but, with equal respect, the

the Contract Clause of Art.I, Sec. 10 of the United States Constitution.

The Supreme Court of Appeals of West Virginia has made it quite clear that it too honors and respects the Contract Clause, holding that:

> " a complaint that could be construed as being either in tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limitation if construed as being in tort."

Cochran v. Appalachian Power Co., 246 S.E.2d, supra, at p. 628 (1978); Harrison v. Casto. 271 S.E.2d 774 (1980).

The rationale of the Supreme Court of Appeals in Cochran, supra, is both pertinent and enlightening in the within case. At page 628, also:

> " But what about the language, 'wilfully, wantonly and negligently ' appearing in the com-

plaint? A summary of the relevant law is set forth in 1 Am. Jur. 2d, Actions, Sec. 8 (1962) as follows: " If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or non-feasance, it is, in substance, an action on the contract, whatever may be the form of the pleading. If the plaintiff states a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not convert the cause of action into one for tort, and the part of his pleading appropriate to an action in tort will be treated as surplusage. And even though an action may be in the form of tort, yet, if the subject of it is based on contract, the action will be attended by all the incidents of an action ex contractu."

In the Act of Congress of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. Sec. 1652, reference is made not only to the statutory

"laws of the several states", but the Act states:

> " The laws of the several states, except where the Constitution or treaties or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply."

Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 90 A.L.R. 2d 252 (2nd Cir.), cert. den. 368 U.S. 821, 82 S.Ct. 39; 7 L. Ed.2d 26 (1961); annot. 98 A.L.R. 2d 265 (1963); United States v. Kimbell Foods, Inc., 440 U.S. 715, at p.728, n. 22, wherein the Supreme Court reminds that " . . when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rules of decision.", citing several previous decisions so holding.

The Circuit Court's disregard of the

National-State Constitutionally-based Policy of Federalism, the requirements of the Acts of Congress, the mandates of over 100 years of unwavering Supreme Court decisions, and the applicable judgments of the West Virginia Supreme Court of Appeals as aforesaid, makes it necessary for review and correction by the Supreme Court that irreparable rent in the fabric of that Policy be avoided.

Several of the more recent decisions demonstrating the Supreme Court's unquestioned affirmation of the foregoing principles are: Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 (1976); Davis v. United States, 411 U.S. 233, 36 L. Ed.2d 216; Fay v. Noia, 372 U.S. 391, 9 L. Ed.2d 837, 83 S.Ct. 822 (1962); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 361-364, 9 L.Ed.2d 357, 83 S.Ct. 448 (1963); Michel v. Louisiana, 350 U.S. 91, 100 L. Ed.2d 83, 76 S.Ct. 158 (1955).

2. A possible misreading of the decision in Runyon v. McCrary, et al., 427 U.S. 160, 179-82, 49 L.Ed.2d 415, 96 S.Ct.2586 (1976), may have caused the Fourth Circuit Court to imply approval of its ad hoc "rule" generally rather than in the context therein. A review of the background facts in that case, and the cases relied upon by the Supreme Court in affirming that application of such ad hoc "rule" will show that the basic rationale of the Court of Appeals cannot apply in the within case.

In Runyon, the Court of Appeals had before it Virginia consolidated Section 1981 actions brought by two black applicants for admission to non-integretated Virginia private schools, both of whom admittedly were rejected solely on the ground of race. When the cases were pending Virginia did not have a specific limitations statute for civil rights cases;

and no state-court decisions in point. The only Virginia statute, strictly construed, which the District court felt was applicable in the circumstances was Sec. 8-24 of of the Virginia Code, providing a one-year limitation for non-surviving "personal actions" not otherwise provided for; and it dismissed the civil rights case filed 3½ years after accrual thereof. In reversing, the Fourth Circuit Court of Appeals substituted the Virginia "personal injury" tort limitation provision of two years, as it had done in two previous cases, wherein the ad hoc "rule" had, in 1972, saved two civil rights cases from similar District Court dismissals. The Supreme Court, at page 181 in Runyon, said:

> " We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law, particularly when the established rule has been

> relied upon and applied in numerous suits filed in the Federal District Courts of Virginia."

The first case in which the Court of Appeals applied its ad hoc rule of construction was Almond v. Kent, 459 F.2d 200, 203-204 (4th Cir. 1972), wherein a prisoner in a Virginia county jail sought damages in a pro se Sec. 1983 suit against the county sheriff and local state police for physical injuries and humiliation experienced during his confinement. The suit was dismissed on the Virginia one-year "catch-all" statute aforesaid. The Court of Appeals justified its application of the Virginia "personal injury" two-year tort statute of limitations by an extrapolation of judicial logic as follows:

> " In the broad sense, every cause of action under Section 1983 which is well-founded results from "personal injuries".Under Virginia law, it is the object of litigation which determines

> the applicability of a statute of limitations, not the form in which suit is brought . . . Hence, our conclusion that the two-year period of limitations, applying to '<u>every</u> action for personal injuries' (emphasis added), applies generally to Section 1983 suits." . . . .
> . . . . . .
> Even if we conclude that a Section 1983 action is not a suit for 'personal injuries' within the Virginia concept of that type of litigation, it is 'more serious than a violation of a state right . . even though the same act may constitute both a state tort and the deprivation of a constitutional right. Monroe v. Pape. "

Obviously, Almond involved no contract or property right so as to warrant application of the Virginia contract limitations period of five years, as noted in the op-

inion of the Court of Appeals at p. 204, where it observed:

> " It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five -year period."

The second case preceding Runyon, supra, in which the Fourth Circuit Court of Appeals applied the "personal injury" two-year Virginia tort statute of limitations in a civil rights claim was Allen v. Gifford, 462 F.2d 615 (4th Cir. 1972). In that case a Section 1982 suit was brought for discrimination in refusal to sell a home to the black plaintiffs. The District Court had dismissed on the Virginia one-year "catch-all" statute, as in Almond. Also, as in Almond, the Court of Appeals reversed on its ad hoc "rule" applied in Almond.

Again, no contract was there involved.

Nor was there any contract involved in Runyon, supra, as attest the observation of Hon. Donald Russell, Cir.J., at 515 F.2d 1082, 1097 in his concurring opinion:

> " It is contended that the five year statute for actions on a contract, Virginia Code Sec. 8013, applies, but it is clear that no action on a contract is involved."

At page 181 in Runyon, also, the Supreme Court was impressed that "numerous" Federal District Courts sitting in Virginia "relied on and applied" the Court of Appeals' ad hoc rule, and cited at n.17 thereat the cases presumably so doing. A review of all of the footnoted cases shows that none was independently rationalized except to cite the Court of Appeals'"rule" in Almond v. Kent, supra, and in Allen v. Gifford, supra, as the basis for their respective holdings; however, in one of the cases cited in said footnote,

namely, Van Horn v. Lukhard, 382 F.Supp. 384, 389 (E.D.Va. 1975), the District Court noted:

> " There is, however, an important qualification to the familiar rule that ' state statutes of limitation govern the timeliness of federal causes of action unless Congress has specifically provided otherwise,"; U.A.W. v. Hoosier Cardinal Corp., supra, 383 U.S. at 703-04, 86 S.Ct. at 1112. A federal court may in the exercise of its Art. III power properly disregard a state statute of limitations purporting to govern the timeliness of a federally created right that is so unusually short that it burdens the assertion of the federal right; Campbell v. Haverhill, 155 U.S. 610, 615, 15 S.Ct.217, 39 L.Ed. 280 (1895); See UAW v. Hoosier Cardinal Corp., supra, 383 U.S. at 707 n.9, 86 S.Ct. 1107; cf. RFC v. Beaver County, supra, 328 U.S. 204, 210, 66 S.

> Ct. 992, 90 L.Ed. 1172 (1946); Moon Ho Kim v. United States, 514 F.2d 179 (D.C.Cir. 1975), or when it discriminates against the federal cause of action, such as the Section 1983 "constitutional tort", by applying a substantially shorter limitations period than that supplied by state law for analogous state created causes of action. Campbell v. Haverhill, supra; . . ."

The Fourth Circuit Court of Appeals apparently overlooked the disappearance of the basis of its Virginia ad hoc "rule" when it relied on Virginia's rule of law that " it is the object of litigation which determines the applicability of a statute of limitations, not the form in which the suit is brought . .", Almond, supra, 459 F.2d at page 204". The Supreme Court of Virginia, in Goodstein v. Weinberg, 219 Va. 105 (1978), departed from its archaic rule of so applying limitattions statutes, and, in step with modern

ruling case law, now holds that the "nature of the action" determines the applicability of the appropriate statute of limitations.

Of greater significance for giving pause to the expansion of the Virginia-applied ad hoc "rule"of the Fourth Circuit Court of Appeals, is the fact that on October 19, 1976, the Congress of the United States enacted Section 1988, which mandates that district courts in "Proceedings in vindication of civil rights" "shall" exercise and enforce all civil rights laws:

> " in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses againt law, the common law, as modified

> and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . ."

It is respectfully suggested that even as to Virginia, Sections 1981, 1982 and 1983 cases, the Fourth Circuit Court's ad hoc "rule" should no longer be required even in non-contract actions. A fortiorari, the said rule is completely inappropriate in this West Virginia contract-based action, in view of the matters set out in reason Number 1. for allowance of the Writ of Certiorari herein prayed for.

3. The Court of Appeals exceeded its authority in declaring in its opinion that the complaint did not assert a sufficient federal cause of action. The District Court's Memorandum Order accompanying its Judgment of dismissal of the case on the sole ground that, pursuant to the requirement of the ad hoc "rule" of the Fourth Circuit Court of Appeals, the two-year bar of the West Virginia "personal injury" tort statute of limitations must be applied, contained two other orders. The other orders, not appealed, were the District Court's denials of the defense of immunity raised by the Board of Education and its members as well as by Kingery as prosecuting attorney; and all motions which raised the defense of the failure of the complaint to state a cause of action for which relief could be granted. In regard to the latter motions, the District Court did more than merely deny same; It specifically found as follows:

" . . the Court finds the complaint adequately to state a cause of action against the defendants, and defendants' motions to dismiss on failure to allege a cause of action are therefore denied." (App. 4,p.).

Respondents neither excepted to said order denying their motions, nor did they ask leave to appeal same.

Pursuant to Rule 3(c) of the Federal Rules of Appellate Procedure, Petitioner's Notice of Appeal to the United States Court of Appeals was specifically limited to the Judgment of Dismissal and to that portion of the Memorandum Order alleging the basis for application of the two-year "personal injury" tort statute of limitations, in accordance with the ad hoc "rule" of the Court of Appeals. The appeal was not general, but intentionally narrowed the issue to be reviewed to:

" . . that portion of the Mem-

> orandum Order supporting said Judgment of Dismissal basing same upon West Virginia's two-year statute of limitations, W.Va. Code Sec. 55-2-12, . ."

Neither Petitioner nor Respondents, either briefed or argued the sufficiency of the complaint in the Court of Appeals; nor was any question raised as to the jurisdiction of either the District Court or the Court of Appeals, based thereon.

Without any cross-appeal or other proceeding to bring before the Court of Appeals an issue as to the sufficiency of the complaint to state a cause of action, it is respectfully submitted that the scope of review in the Court of Appeals was limited as set out in the Notice of Appeal; Delta Air Lines, Inc. v. August, 446 U.S. 907, 64 L.Ed.2d 259, 101 S.Ct. 1146, 1155 (1981); Elfman Motors, Inc. v. Chrysler Corp, 567 F.2d 1252 (3rd Cir. (1977); Spound v. Mohasco Industries, Inc. 534 F.2d 404 (C.A. Mass. 1976), cert.den.

429 U.S. 886, 50 L.Ed.2d 167, 97 S.Ct. 238, reh. den. 429 U.S. 988, 50 L.Ed.2d 601, 97 S.Ct. 513; Carter v. Powell, 104 F.2d 1012, cert.den. 308 U.S. 611, 84 L.Ed. 511, 60 S. Ct. 173; Colvin v. Dempsey, 477 F,2d 1283 (5th Cir. 1973); Kortz v. Guardian Life Ins. of Am., 144 F.2d 676, (C.C.A. Colo. 1944), cert. den. 323 U.S. 728, 89 L.Ed. 584, 65 S. Ct.63; Fain v. Caddo Parish Police Jury, 564 F.2d 707 (C.A. La. 1977; Lumpkin v. Ricketts, 551 F. 2d 680 (C.A.Ga. 1977), reh. den. 554 F,2d 475; cert. den. 434 U.S. 957, 54 L.Ed.2d 316, 98 S.Ct. 485 (1977).

Without stating any statutory, decisional or other authority as warranting its so doing, the Court of Appeals departed from the issue for review, and, in effect held that the complaint herein failed to state a federal cause of action, saying:

> "Although McCausland had and still may have a cause of action on his contract in the state courts, to demonstrate the required con-

> constitutional basis for his federal complaint, he must allege personal injury transcending contract rights."

From paragraphs 1., 14, 15, 17, 20(f), 21, 27, 29, 33 and 34, as well as from the employment contract attachments to the complaint, it is readily seen that the very essence of the claim is the unlawful breach thereof, and deprivation without due process of the benefits thereunder; yet the Court of Appeals observes only that there is a claim for damages for civil rights violation in connection therewith, and narrowly construes the undenied complaint as a tort dismissable under its approved ad hoc rule for non-contract actions.

In thus ignoring the contract base of the complaint, also, the learned Court of Appeals deigns to advise that Petitioner seek relief only in the state courts, contrary to the well established principle that exhaustion of state remedies is not

a prerequisite for filing a federal civil rights action; Maine v. Thiboutot, 448 U.S. 1, 65 L. Ed.2d 555, 100 S.Ct. 2502 (1980); Board of Regents etc. v. Tomanio, supra, 446 U.S. 418, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980); nor may even the Supreme Court give advisory opinions; New York City Transit Authority et al. v. Beazer et al., 440 U.S. 568, 59 L.Ed.2d 587, 99 S.Ct. 1355 (1979).

It is respectfully submitted that the learned Court of Appeals exceeded its jurisdiction in entering in its opinion the unsolicited and unauthorized arbitrary new standard for pleading a civil rights cause based on written contracts of public employment, and in admonishing the plaintiff to take his case to the state courts, thus putting a chill on the rights given by Acts of Congress to victims of deprivations entitling them to bring their suits to their federal courts, as well as to

their state courts, if need be, as it has certainly been in the within action.

4. The conflict that exists in the Circuit and District Courts on the proper approach to determine the "most appropriate" or "most analogous" type of state action limitation is most confusing to the bar, the courts, and to victims who must plan intelligently their legal remedies. For example, the positive opposing view of a well-known and distinguished District Judge in the United States District Court for the Eastern District of Pennsylvania, Hon. John P. Fullam, D.J. in Beamon v. W,B.Saunders Co., 413 F. Supp. 1167, at p. 1175, states his view with characteristic pointednes:

> " Admittedly, interference with contractual relations may be characterized as "tortious conduct", but this does not necessarily mean that the statute of

> limitations governing torts is the "most appropriate" or "most analogous" statute of limitations. Rather, for the reasons expressed in Jones v. United Improvement Corp,, 383 F.Supp. at 431, the "most appropriate" limitations period as applied to employment discriminations cases is 12 P.S. Sec. 31 ."

In the Seventh Circuit, in Beard v. Robinson, 562 F.2d 331 , at 337, n.7 reviews the conflict between the Circuits before resolving the conflict inits own Circuit by rejecting the tort-based limitations period for civil rights cases in that Circuit, in favor of a five-year "catch-all statute", as "most appropriate."

A list of all the cases varying in the choices of a proper basis for applying a state statute of limitations in civil rights caes would require an extended brief much too long for a Petition for Certiorari; but in brief, if permitted so to do, Petitioner will fully address the point if

granted opportunity to do so.

In International Union, United Auto, etc. Workers of Am. v. Hoosier Cardinal Corp., supra, 383 U.S. 696, at 705, n. 7 (1966), the Supreme Court noted:

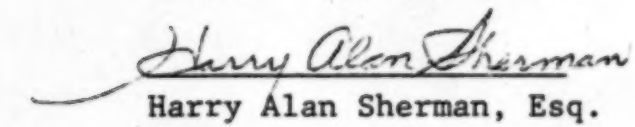
> " The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining contract. Such an action closely resembles an action for breach of contract at common law."

It is respectfully suggested that the foregoing observation would be " most appropriately" applied to the within action.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that allowance of a Writ of Certiorari be granted in the within case.

Respectfully submitted,



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J U D G M E N T

UNITED STATES COURT OF APPEALS
For The
Fourth Circuit

No. 80-1780

FILED
May 27, 1981
U.S. Court of Appeals
Fourth Circuit

Bright McCausland,

Appellant,

vs.

A true copy, Te
William K.Slate,II, Cle

Mason County Board of Education, a corporation; Harry Siders, individually and as President of said corporation; Bill Brady and Robert Adkins, individually and together with Harry Siders, constituting a majority of said Board of Education; Donald C. Kingery, Esq., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and Walter Villars and Nellie Preston,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for

the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court thatthe judgment of the said Court appealed from in this cause be, and the same is hereby

AFFIRMED

/s/ William K. Slate, II

C L E R K

A TRUE COPY, certified this
22nd day of June, 1981.

RONALD D. LAWSON, CLERK
by /s/ Teresa D. Sanford
Deputy Clerk

E N T E R E D

Jun 22 1981

.....Order Book

No. 53 Page 269

PUBLISHED

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 80-1780

Bright McCausland,

v. Appellant.

Mason County Board of Education, a corporation; Harry Siders, individually and as President of said corporation; Bill Brady and Robert Adkins, individually and together with Harry Siders, constituting a majority of said Board of Education; Donald C. Kingery, Esq., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and Walter Villars, and Nellie Preston,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert J. Staker, District Judge

---

Argued April 8, 1981 Decided May 27, 1981

Before WINTER, Chief Judge, HAYNSWORTH, Senior Circuit Judge, and HALL, Circuit Judge.

Harry Alan Sherman (Donald R. Wilson, Preiser & Wilson on brief) for Appellant; Jerry N. Ragan (John F. Wood, Jr., Wood, Grim & Delp on brief); John J. Nesius (Davis & Nesius on brief);(David Nibert, Kingery & Nibert; Charles J. Hyer, Hyer & Littlepage; R. Michael Shaw, Shaw & Stein on brief) for Appellees.

WINTER, Chief Judge:

Bright McCausland appeals from the judgment of the district court dismissing his complaint under 42 U.S.C. Sections 1981, 1982, 1983, 1985 and 1986 (1976), because the West Virginia statute of limitations barred his claims. We think the district court applied the statute properly and affirm.

McCausland filed his federal complaint over five years after the Mason County Board of Education discharged him from his post as a high school principal. The essence of his claim is that he was deprived of his liberty

and property interests in his teaching position without due process of law.

For the most part, the Reconstruction Civil Rights Acts do not provide specifically for limitations on the time in which claims thereunder may be brought. The federal courts therefore borrow an appropriate limitations period from the state in which the claims arose. Under the law of West Virginia applicable here, the limitations period for actions brought on contracts is five or ten years, W.Va. Code Sec. 55-2-6, and the limitations period for actions brought for personal injuries is two years, id. Sec.55-2-12. McCausland contends that the basis of his action stems from the Board of Education's breach of his teaching contract, and that the five or ten year limitation on contract actions should therefore apply.

We have consistently held, however, that the Reconstruction Civil Rights Acts create causes of action "where there has been injury,

under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person." Almond v. Kent, 459 F.2d 200, 204 (4 Cir. 1972; accord, Allen v. Gifford, 452 F.2d 615 (4 Cir.), cert.den.409 U.S.876 (1972); McCrary v. Runyon, 515 F.2d 1082,1097 (4 Cir. 1975), affd., 427 U.S. 160, 180-82 (1976). As a consequence it is to the state statute of limitations for personal injuries to which we usually look in determining when claims are time-barred. Although McCausland had and may still have a cause of action on his contract in the state courts, to demonstrate the required constitutional basis for his federal complaint he must allege personal injury transcending contract rights. It follows that, in the absence of any state statute of limitations specifically applicable to suits to redress a violation of civil rights, the West Virginia limitation on personal injury actions applies in this case.

McCausland argues that his federal claims are nonetheless not barred because the conduct of the defendants violative of his rights has been continuous. He fails to allege any overt act by the defendants since their refusal to reinstate him after directed to do so by the State Superintendent of Schools in April, 1974, still some four and one-half years prior to the filing of his federal complaint. The Supreme Court has held that employment actions brought under federal civil rights statutes accrue from the date of the discriminatory discharge in the absence of additional overt acts. Delaware State College v. Ricks, _____ U.S.____, 66 L.Ed. 2d 431, 439-40 (1980). McCausland's claims are thus barred by the West Virginia statute of limitaions, and the district court properly dismissed his complaint.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

Aug.13,1980
48-351

Bright McCausland,
Plaintiff

v.

CIVIL ACTION NO.
78-3375

Mason County Board of Education, a corporation; Harry Siders, individually and as President of said corporation; Bill Brady and Robert Adkins, individually and together with Harry Siders constituting a majority of said Board of Education; Donald C. Kingery, Esq., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and Walter Villars and Nellie Preston,
Defendants

JUDGMENT

In conformity with the Memorandum Order filed this date herein,

IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

1. That the motions to dismiss by the defendants be and the same are, granted;

2. That the complaint in the above-styled action be, and the same is, dismissed;

3. That this action be, and it is, dismissed and retired from the court's docket.

The clerk is directed to mail a certified copy of this Order to all counsel of record.

ENTER:

/s/ ROBERT J. STAKER

ROBERT J. STAKER

United States District Judge

A TRUE COPY, certified this
13th day of August, 1980
JAMES A. McWHORTER, Clerk
/s/ Stephanie L. Bellomy
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

Aug.13,1980

Bright McCausland,

Plaintiff

Bk.48--p351

v.

CIVIL ACTION NO.
78-3375

Mason County Board of Education, a corporation; Harry Siders, individually and as President of said corporation; Bill Brady and Robert Adkins, individually and together with Harry Siders constituting a majority of said Board of Education; Donald C. Kingery, Esq., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and Walter Villars and Nellie Preston,

Defendants

MEMORANDUM ORDER

This matter is presently before the Court pursuant to various motions to dismiss filed by the defendants. The complaint of the plaintiff is based on the Civil Rights Act of 1866 and April 20, 1871; 42 U.S.C.

Sections 1981, 1982, 1983, 1985 and 1986;the First, Fourth, Fifth, Tenth and Fourteenth Amendments to the United States Constitution; and 28 U.S.C. Sections 1331(a) and 1343.

Plaintiff alleges a conspiracy and other acts among the defendants, including the termination of his employment as principal of Hannan High School in Mason County,as constituting violation and deprivation of his civil rights. More specifically, he alleges that defendants filed scandalous, malicious and false charges against him; schemed to oust him as principal; conspired to interfere with his employment contract; held a sham, formal hearing for the purpose of pretending to grant him his due process rights; denied him a fair and impartial public hearing; and on September 1, 1973, terminated his employment as principal by a majority vote of the Mason County Board of Education.

Plaintiff timely appealed to the State Superintendent of Schools, who, on

April 4, 1974, filed his opinion and ordered reinstatement of the plaintiff with pay from the time of his dismissal. Plaintiff alleges that defendants refused to reinstate him in compliance with said order and instead petitioned for certiorari to the Circuit Court of Kanawha County, West Virginia, which refused certiorari on the ground of lack of jurisdiction. Defendants then petitioned the Supreme Court of Appeals of West Virginia for certiorari, and that the Circuit Court was reversed and ordered to issue certiorari as directed, whereupon, a preliminary hearing was held in that Circuit Court on August 29, 1977, but the matter therein was still pending upon the filing of this action here. Plaintiff alleges that defendants' refusal to reinstate him after the State Superintendent's order, pending review of the matters in the Courts of West Virginia, and using such review procedures for republishing the vicious and libelous untruths, has caused plaintiff deprivation of his good name and

his employment over the past few years and his acceptance in the community.

The defendants filed motions to dismiss based essentially on three general grounds: governmental immunity; failure to state a cause of action against defendants; and the statute of limitations.

Addressing the ground of governmental immunity: The defendant Kingery claims that he was acting in his official capacity as Prosecuting Attorney for Mason County, thereby being immune from suit. The defendant School Board, and the individual members of the Board who are defendants herein, also claim immunity.

While prosecuting attorneys are protected from liability when acting in their official capacity, such immunity is not absolute. When a prosecuting attorney is not called upon to use quasi-judicial discretion, or where he is not acting within the scope of his jurisdiction, then he is not entitled

to immunity. Imbler v. Pachtman, 424 U.S.409 (1976); McCray v. State of Md., 456 F.2d 1, 3 (4th Cir. 1972).

Immunity is not absolute for school board members or school officials, although they are entitled to a "qualified good-faith immunity" from any liability for damages pursuant to Section 1983. Wood v. Strickland, 420 U.S. 308 (1975). As long as the school officials acted in good faith in discharging their official duties and did not maliciously intend to deprive plaintiff of his constitutional rights, they enjoy immunity from liability. Id. at 322; see also Paxman v. Campbell, 612 F.2d 848, 856 (4th Cir. 1980). The burden is not on the plaintiff to plead bad faith but on the defendants to plead good faith as an affirmative defense; plaintiff's burden is merely to allege that some person deprived him of a federal right and that such person acted under color of state law. Gomez v. Toledo, 48 U.S.L.W. 4600

(May 27, 1980) (No. 79-5601).

The privilege of absolute immunity should be applied sparingly in civil rights suits. To provide too much protection to state officials would contradict congressional purpose to make liable every person, who, under color of state law, abridges a person's rights. McCray, supra.

For the foregoing reasons, the Court denies dismissal on the ground of governmental immunity.

Addressing the defendants' ground that the complaint is insufficient and fails to state a cause of action against said defendants: A complaint which is brought under 42 U.S.C. Sec. 1983, in order to survive a motion to dismiss, must allege an infringement of a right secured by the Fourteenth Amendment and that defendants' acts were done under color of state law. Canty v. City of Richmond, Va, Police Dept., 383 F. Supp. 1396 (E.D. Va. 1974), affd. 526 F.2d 587

(4th Cir. 1975), cert.denied, 423 U.S. 1062 (1976; Gomez, supra.

The Fourth Circuit's opinion and poaition, concerning the sufficiency of a complaint, has been that the district courts must be especially solicitous of civil rights plaintiffs and the complaint should "not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." Canty, supra at 1399; see also Conley v.Gibson, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the Court should not permit technical pleading requirements to defeat vindication of any constitutional rights alleged by plaintiff to have been infringed. Loe v. Armistead, 582 F.2d 1291, 1295 (4th Cir. 1978) (U.S.App. pending); Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978) cert. denied. 439 U.S. 970 (1978). Disputes should be decided on their facts, as devel-

oped through discovery procedures and trial rather than on the skill or ineptitude of those persons who draw up the pleadings. Loe supra at 1295.

In accordance with the foregoing guidelines, the Court finds the complaint adequately to state a cause of action against the defendants, and the defendants' motions to dismiss based on plaintiff's failure to allege a cause of action are therefore denied.

The remaining major ground for dismissal is that of the statute of limitations. 42 U.S.C. Sec. 1983 does not prescribe a federal statute of limitaions, and the general rule is that the state statute of limitations applies tosuch actions. Bireline v.Seagondollar, 567 F.2d 260 (4th Cir. 1977), cert. denied, 100 S.Ct. 83 (1979); Allen v. Gifford, 462 F.2d 615 (4th Cir. 1972), cert.den. 409 U.S. 876 (1972); Johnson v. Dailey, 479 F.2d 86 (8th Cir. 1973), cert. den., 414 U.S.

1009 (1973). While sections 1981, and 1983, 1985 follow the state statute of limitations, section 1986 has its own statute of limitations of one year. Hughes v. Smith. 264 F. Supp. 767 (D.N.J. 1967), affd. 389 F.2d 42 (3rd Cir. 1968); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970), cert.denied, 400 U.S. 911 (1970); Knowles v. Carson, 419 F.2d 369 (5th Cir. 1969).

Defendants claim that the appropriate state statute of limitaions is found in W.Va. Code Sec. 55-2-12, as follows:

> "Every personal action for which no limitation is otherwise prescribed shall be brought:(a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property;(b) within two years next after the right to bring the same shall have accrued if it be for

> damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative."

In Jamison v. Olga Coal Co.,335 F. Supp. 454 (S.D.W.Va. 1971), the court stated that it must apply the statute of limitations most appropriate for the federal cause of action. Plaintiff here is claiming his civil and constitutional rights to be violated and bases his action on the United States Constitution and statutory provisions under the Civil Rights Acts. The court in Almond v.Kent, 459 F.2d 200 (4th Cir. 1972), held that every cause of action under Sec. 1983, in a broad sense, results in personal injuries; Sec. 1983 creates a cause of action where there has been injury, under color of state

law. Such being true, the most appropriate statute of limitations is the two-year limitation as set out in W.Va. Code Sec. 55-2-12 and the one year limitation under Sec.1986.

The plaintiff was dismissed from his position as principal of Hannan High School on or about September 1, 1973,and he filed suit in this Court on or about December 7, 1978, a period of more than five years from the date of his dismissal. Defendants allege that the statute of limitations commenced to run as of September 1, 1973, with plaintiff's dismissal, since that was the date plaintiff knew of his injuries. Plaintiff, on the other hand, alleges that the complaint asserts wrongs and deprivations of a continuous, ongoing nature; wherefore the period of limitations did not begin to run until the date of his last injury.

As emphasized in Bireline, supra, although the statute of limitations in Sec. 1983 actions is borrowed from state statute, the time of accrual of the action is deter-

mined by federal law. The time of accrual is equivalent to the time when the plaintiff knows or has reason to know of his injury. Id.; Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975). However, a plaintiff may be excepted from the strict time limits if there are continuing acts of discrimination involved, that is,the plaintiff is not complaining of a discrete act of discrimination. Tolson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1976).

When analyzing whether the complaint alleges continuing acts sufficient to exclude the filing of the complaint from the time limitations, the court must keep two principles in mind: (1) The complaint must allege a present and ongoing violation, and it is not enough to allege a present effect of past discrimination. United Air Lines,Inc. v.Evans, 431 U.S. 553 (1977); and (2) the plaintiff may not circumvent the time limits by characterizing a completed act of discrimination as a continuing violation. Tarvesian v. Carr

Division of TRW, Inc., 407 F.Supp. 336 (D.Mass. 1976). It is incumbent upon the court to analyze the complaint and to make sure that true continuous discrimination exists. Dumas v. Town of Mt, Vernon, Ala, 612 F.2d 974 (5th Cir. 1980).

Courts have continually held that maintenance of a discriminatory hiring system is of a continuing nature. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973), and maintenance of a discriminatory promotion system has also been held to be continuous violation of civil rights. Clark v. Olinkraft, Inc., 556 F.2d 1219, (5th Cir. 1977), cert. denied, 434 U.S. 1069 (1978); Rich v. Martin Marietta Corp,, 522 F,2d 333 (10th Cir. 1975). Denial of rights and benefits under a seniority system is of a continuous nature. Allen v. Amalgamated Transit Union Local Union 788, 554 F.2d 76 (8th Cir. 1977), cert. denied, 434 U.S. 891 (1977); Williams v. Norfolk & Western Ry.

Co., 530 F.2d 539 (4th Cir. 1975). Where there is a continued conspiracy to violate anti-trust laws, one continuous violation may be determined. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

The acts of the defendants of which the plaintiff complains herein are not of like nature to those in the foregoing cases. The plaintiff here was terminated from employment. Termination of employment, like refusal to hire, is usually viewed as one, discrete event rather than as a continuing violation. Dumas, supra: Olson v. Rembrandt Printing Co. 511 F.2d 1228 (8th Cir.1975).; Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975). While there may be present effect of past discrimination by defendants, there is no present and ongoing violation. Any alleged acts of discrimination were completed at the time plaintiff was terminated from employment.

When defendants refused to reinstate plaintiff pursuant to the order of the State

Superintendent and instead petitioned for certiorari, there was again but one discrete event, a completed act of discrimination, and the time commenced to run as of that particular event. Thus, even if the Court considers the petition for certiorari as a separate act of discrimination from the act of terminating plaintiff's employment, the time period for filing the complaint has run.

It would strain the imagination of this Court to find the acts of the defendants to be of a continuous nature. As explained by the Court in Fitzgerald v. Seamans, 553 F. 2d 220, 230 (D.C. Cir. 1977): "(T)he mere failure to right a wrong and make plaintiff whole cannot be construed as a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule."

Whereupon, for the foregoing reasons, the Court finds that the plaintiff has not timely filed his complaint, and this

cause is barred by the statute of limitation. It is accordingly ORDERED that the motions of the defendants to dismiss this action are bereby GRANTED. IT IS FURTHER ORDERED that this action be, and the same hereby is, dismissed and retired from the Court's docket.

The Clerk is directed to mail a certified copy of this Order to all counsel of record.

ENTER:

/s/ ROBERT J. STAKER

ROBERT J. STAKER
United States District Judge

A TRUE COPY, certified this
13th day of August 1980
JAMES A. McWHORTER, Clerk
/s/ Stephanie L. Bellomy,
Deputy

In The

SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14672

MASON COUNTY BOARD OF EDUCATION, ET AL.

V.

STATE SUPT. OF SCHOOLS, ET AL.,
BRIGHT McCAUSLAND

Mason County Reversed.

McGraw, Justice

1. "Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting, or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. pt. 3, Trimboli v. Board of Education of the County of Wayne, __W.Va.__, 254 S.E.2d 561 (1979).

2. "The authority of the county board of education to dismiss a teacher under W.Va. Code 1931, 18A-2-8, as amended, must be based upon the just causes listed therein

and must be exercised reasonably, not arbitrary and capriciously." Syl. pt. 3, Beverlin v. Board of Education of Lewis County, __W.Va.__, 216 S.E.2d 554 (1975).

3. The procedures specified in West Virginia Board of Education Policy No. 5300(6)(a) must be followed in every proceeding under W.Va. Code 18A-2-8 [1969] for the dismissal of a school employee on the ground of incompetency.

4. It is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the system in a permanent, non-correctable manner.

5. A county board of education may receive complaints against a school employee from citizens where the complaints involve the professional competency of the employee. The board should not file formal dismissal charges against him until after it has received a professional evaluation of his competency and it has provided him with an improvement period as prescribed by § 5300(6)(a) of the Policies, Rules and Regulations of the West Virginia Board of Education.

McGraw, Justice

The central issue in this case is whether the Board of Education of Mason County erred in dismissing the appellant, Bright McCausland, as principal of a high school without first affording him an improvement period and other rights prescribed by § 5300(6)(a) of the Policies, Rules and Regulations of the West Virginia Board of Education. After carefully reviewing the record we conclude that the Board did err, and we reverse the decision of the Circuit Court of Kanawha County upholding the Board's action.

On August 18, 1973, the Mason County Board of Education formally initiated proceedings to dismiss the appellant as principal of Hannan High School. The Board's action was taken after two citizens of the school district filed complaints alleging that the appellant was incompetent and that he had willfully neglected his duties as school principal.

After service of proper notice on the appellant, a hearing was held in the matter on September 1, 1973. At that hearing several teachers and school employees gave evidence in support of the charges. The county superintendent of schools, the only person in a supervisory capacity who testified, stated that his evaluations of the appellant

had been favorable and that the appellant had carried out the administration's policies at the high school.

At the conclusion of the hearing the Board found that there was sufficient evidence of seven incidents of incompetence, willful neglect of duty, and intemperance to justify the appellant's dismissal.[1] The Board then, without affording the appellant an opportunity to improve his job performance, declared its three-year contract with him void.

The Board's action ignored two requirements of § 5300(6)(a) of the Policies, Rules, and Regulations of

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[1] The Board found that:

1. The appellant had willfully failed to provide an effective discipline policy at Hannan High School and that he was not equipped to handle the discipline problem that existed at Hannan during the 1972-1973 school term.

2. The appellant had exhibited intemperate conduct toward students and teachers at Hannan High School during the 1972-1973 school term. On occasion he had directed profane language at students and teachers.

3. On occasion the appellant had entered classrooms where classes were in session and slept, in the presence of teachers and students, during the 1972-1973 school term. He also slept in other areas of the school.

4. The appellant had willfully refused to evaluate properly the teachers at Hannan High School during the 1972-1973 school term and had advised teachers at the school that the evaluations were purely a social matter and had nothing to do with their teaching ability.

5. He had willfully refused to follow the grievance procedure promulgated by the Board of Education and had misrepresented the function of the grievance procedure to the teachers at the high school.

6. The appellant's attitude toward the students of the high school was not one of a competent educator.

7. The appellant had willfully failed or had not been competent to perform many of his duties as principal of the high school during the 1972-1973 school term.

the West Virginia Board of Education. That section stipulates that a decision to terminate the employment of a school employee should be based on an evaluation of his job performance, and not upon factors extraneous thereto. Since the testimony of the county superintendent of schools, the only supervisory person who testified, was favorable to the appellant, it is obvious that the Board's decision was not based upon his evaluation of the appellant's performance. Also, it is clear that because the dismissal occurred immediately after the hearing the appellant was not afforded an improvement period as required by § 5300(6)(a).[2]

Pursuant to the provisions of W.Va. Code 18A-2-8 [1969], Mr. McCausland appealed to the State Superintendent of Schools. In addition to challenging the sufficiency of the evidence, he took the position that § 5300(6)(a) permitted the Board to dismiss an employee only upon a complaint originating within the school system and that the Board could not dismiss him on complaints filed by citizens.

[2] West Virginia Board of Education Policy No. 5300(6)(a), which was in effect in Mason County at the time of the appellant's dismissal, provides:

> (a) Every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance prior to the termination or transferring of his services, and can only do so with assistance of regular evaluation.

We recognized in Trimboli v. Board of Education of Wayne County __W.Va.__, 254 S.E.2d 561 (1979), that the evaluation referred to in this section is a supervisory evaluation; that is, one made by a supervisor of the employee.

The State Superintendent, after reviewing the record of the case, concluded that there was no competent evidence to support the holding that the appellant was guilty of intemperance or cruelty. He further found that the charges of willful neglect of duty were brought by inhabitants of the school district, rather than by the appellant's supervisor, and that they were thus not properly before the School Board. He ordered that the appellant be reinstated with back pay and interest.

Upon receiving the decision of the State Superintendent of Schools, the Board of Education, on May 10, 1974, petitioned the Circuit Court of Kanawha County for a writ of certiorari. After reviewing the petition the Circuit Court on August 1, 1975, ruled that the Board of Education lacked standing to seek judicial review of the State Superintendent's decision. The Board appealed the Circuit

Court's ruling to this Court, and we, in Mason County Board of Education v. State Superintendent of Schools, __W.Va.__, 234 S.E.2d 321 (1977), declared that a county board of education does have standing to obtain judicial review by writ of certiorari of an order of the State Superintendent of Schools requiring the reinstatement of an employee dismissed by the county board. We remanded the case to the Circuit Court for its further consideration.

Upon remand, after reviewing the record made before the Board, the Circuit Court of Kanawha County concluded

that despite the provisions of § 5300(6)(a), W.Va. Code 18A-2-8 [1969] clearly empowered a board of education to dismiss a school employee. The circuit judge rejected the appellant's contention, adopted by the State Superintendent, that the Board could not properly dismiss him on matters brought to the Board's attention by citizens. He also reviewed the evidence in the case and concluded that it supported the finding that the appellant was guilty of willful neglect of duty, intemperance and cruelty. He reinstated Mr. McCausland's dismissal.

In his present appeal from the ruling of the Circuit Court the appellant contends that the decisions of the School Board and the Circuit Court, denying him the benefit of § 5300(6)(a) of the Policies, Rules and Regulations of the West Virginia Board of Education, are inconsistent with our holding in Trimboli v. Board of Education of the County

of Wayne, __W.Va.__, 254 S.E.2d 561 (1979).[3] He also contends that the decisions are contrary to the evidence adduced in the case.

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[3] The appellee Board of Education argues that the applicability of § 5300(6)(a) was not considered and decided by the court below and that it should not, therefore, be considered on appeal. Both the State Superintendent and the circuit court addressed the question of whether the appellant could be dismissed on complaints originating with private citizens. Likewise, in addressing the question of whether the evidence supported the charges, both determined that he could be dismissed on evidence other than that derived from a suspensory evaluation. Although they did not openly rule upon § 5300(6)(a), they considered issues integrally connected with its applicability.

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In Trimboli, supra, we examined § 5300(6)(a) as it applied in a proceeding for the dismissal of an employee who was charged with being administratively and professionally incompetent. We concluded that § 5300(6)(a) extended two rights not elsewhere afforded such an employee. It entitled him to an evaluation by supervisory personnel, and it entitled him to an opportunity to improve his administrative or professional conduct. We held:

> [f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting, or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable. Syl. pt. 3, Trimboli v. Board of Education of the County of Wayne, supra.

The rulings of the Board of Education and the Circuit Court in the case before us raise the question of whether, even in view of the language of Trimboli, supra, a board of

education must base its decision to dismiss upon a supervisory evaluation of an employee and must afford him an improvement period when W.Va. Code 18A-2-8 [1969] clearly provides "[n]otwithstanding any other provision of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetence, cruelty, insubordination, intemperance, or wilful neglect of duty . . . ."

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In Beverlin v. Board of Education of Lewis County, __W.Va.__, 216 S.E.2d 554 (1975), we reviewed W.Va. Code 18A-2-8 [1969], and we concluded that although it granted a board of education broad powers in dismissing an employee, it did not authorize a board to act arbitrarily or capriciously. We said, "[t]he authority of the county board of education to dismiss a teacher under W.Va. Code 1931, 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrary and capriciously." Syl. pt. 3, Beverlin v. Board of Education of Lewis County, supra.

With regard to problems involving the professional and administrative competency of school employees we have said,

> [t]he law does not contemplate that the members of a board of education shall supervise the professional work of teachers, principals and superintendents. They are not teachers, and ordinarily not qualified to be such. Generally they do not possess qualifications to pass upon methods of instruction and discipline. The law clearly contemplates that professionally trained teachers, principals and superintendents shall have exclusive control of these matters." Rogers v. Board of Education, 125 W.Va. 579, 588, 25 S.E.2d 537 (1943); cf. Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949).

Because they do not generally possess the qualifications to evaluate professional competency, it is improper for

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a school board to dismiss an employee for incompetency without an evaluation by someone qualified to render an opinion on such a question. It is evident from the wording of § 5300 that it is designed to insure that an employee is dismissed for incompetency only after he has been evaluated by someone qualified to make such an evaluation.

Our holding in Trimboli, supra, requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the

conduct examined in Trimboli, supra, and in Rogers, supra, be understood to mean an offense or conduct which affects professional competency.

Accordingly, we hold that the procedures specified in West Virginia Board of Education Policy No. 5300(6)(a) must be followed in every proceeding under W.Va. Code 18-A-8 [1969] for the dismissal of a school employee on the ground of incompetency.

While § 5300(b)(a) does not proscribe discharge for irremediable conduct, we note that it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.

Despite the labels given to the appellant's conduct here, the charges against him were clearly with the purview of § 5300(6)(a) matters. In failing to follow the procedures established by § 5300(6)(a) the Board erred.

This case also presents the question of whether an employee of a school system may be dismissed upon a complaint initiated by a citizen outside the school system. The answer is clearly yes. Suggestions otherwise are inconsonant with Article II, section 2 and Article III, section 2, of our constitution, both of which mandate

accountability to the citizenry by all officers and employees of the body politic in this State.

The purpose of Section 5300 is to place the evaluations of competency of professional and administrative school personnel in the hands of professionals where, if the complaint if found to be meritorious, the person charged is notified and afforded an improvement period to correct the problem before final action. In this manner, the Board of Education can then proceed in a proper, enlightened

manner in the making of its final decision. This procedure does not in any way circumscribe the filing or initiating of a complaint by any interested citizen. We therefore conclude that a county board of education may receive complaints against any school employee from citizens and that the board should act upon these complaints, order an evaluation, and discharge an employee if an improvement period proves to be in vain.

The judgment of the Circuit Court of Kanawha County is, therefore, reversed, and it is ordered that the appellant be reinstated to his position with back pay.

Reversed.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Bright McCausland,

Plaintiff

v. CIVIL ACTION NO. 78-3375

Mason County Board of Education, a corporation; Harry Siders, individually and as President of said corporation; Bill Brady and Robert Adkins, individually and together with Harry Siders constituting a majority of said Board of Education; Donald C. Kingery, Esq., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and Walter Villars and Nellie Preston,

Defendants

COMPLAINT

Plaintiff, by his attorneys, claims of

of defendants, damages both compensatory and punitive, upon the following Causes of Action:

1. Jurisdiction of this Honorable Court is predicated upon the United States Civil Rights Acts of 1866 and April 20, 1871; the First, Fourth, Fifth, Tenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C.A. 1981, 1982, 1983, 1985 and 1986; plaintiff's federally guaranteed liberty interest, including his right to his good name, privacy, equal protection of the law without discrimination, due process of law, including fair and impartial administrative hearing; malicious and knowing interference with and deprivation of his employment contract and right to work as a qualified and certified school principal; and his rights under 28 U.S.C.A. 1331(a) and 1343 to sue for violation of his said rights.

2. Plaintiff is an adult citizen and resident of Mason County, West Virginia, residing at Henderson, West Virginia 25106

therein.

3. Defendant Mason County Board of Education is a quasi-public corporation of the State of West Virginia, having statutory powers and authority as set forth in the School Laws of West Virginia, and being eligible for shares of federal grants, inter alia, in agricultural, vocational, library, teacher and student loan programs pursuant to applicable statutes of the United States and of the State of West Virginia. Said defendant corporation maintains its office in Point Pleasant, Mason County. West Virginia.

4. Defendant Harry Siders is the constituted and acting President of the Mason County Board of Education, and is a citizen and resident of said County.

5. Defendant Bill Brady is an elected and acting member of the Mason County Board of Education, and is a citizen and resident of said County.

6. Defendant Robert Adkins is an el-

ected and acting member of the Mason County Board of Education, and is a citizen and resident of said County.

7. At all times pertinent Defendants Siders, Brady and Adkins constituted a majority of the Mason County Board of Education.

8. Defendant Donald C. Kingery is a practicing attorney at law and a citizen and resident of Mason County, West Virginia. At all times pertinent, he was the duly elected Prosecuting Attorney for Mason County, and Counsel for the Mason County Board of Education, and was acting under color of his said offices.

9. Defendant Walter villars is an adult citizen and resident of Mason County, West Virginia.

10. Defendant Nellie M. Preston is an adult citizen and resident of Randor, Wayne County, West Virginia.

11. At all times pertinent, Defendants Siders, Brady and Adkins did jointly

and collusively act under color of their offices as majority members of the Mason County Board of Education, and did lend their said offices to the malicious, corrupt and conspiratorial intent and purposes of the other defendants, to the great damage, deprivation and hurt of the plaintiff as more particularly hereinafter set forth.

12. That plaintiff did at no time waive any of his rights or ratify or condone any of the actions or matters complained of.

FIRST CAUSE OF ACTION

13. Plaintiff reasserts each and every of the averments of Paragraphs 1. through 12. of this Complaint as if herein fully set out.

14. At all times pertinent, plaintiff was fully qualified and duly appointed principal of Hannan High School in Mason County under a Professional Administrative Certificate issued by the Department of Ed-

ucation of the State of West Virginia, and under contract for a period of three years commencing July 1, 1972, which said contract, by reference thereto is made part hereof and attached as Exhibit 1 to the within Complaint.

15. Upon information and belief, plaintiff avers that during the first quarter of 1973, Defendant Walter Villars and Defendant Nellie Preston combined, confederated and agreed together to advance a scheme for ousting plaintiff from his position as principal of Hannan High School, and to eventually supplant plaintiff in that position by Richard Haycraft, a relative by marriage and friend of Defendant Villars. In pursuance of said scheme, the said defendants did file scandalous, malicious and knowingly false "charges" against plaintiff, through and with the connivance of Defendant Harry Siders.

16. That prior to or on September 1, 1973, upon plaintiff's information and be-

lief, Defendants Siders, Adkins and Brady met secretly, without informing Board members Ray Fields and Bill Withers, for the purpose of planning strategy and tactics in controlling the formal "hearing" set for September 1, 1973, on the false charges as aforestated, to the end that a judgment of dismissal of plaintiff be assured.

17. That the conduct and actions of Defendants Villars, Preston, Siders, Adkins and Brady as aforesaid were in flagrant violation of the School Laws of West Virginia, the Code of Ethics applicable for School Board members in West Virginia, the declared Legislative policy of West Virginia to assure qualified professionalmanagement and staffing of schools free from political interference,and the requirement that all business of the Board of Education be conducted in formal meetings only, upon the open participation and consideration of only properly qualified and elected members thereof. Further, the said Defen-

dants did thereby engage in and further a wholly unlawful conspiracy to interfere with and subvert plaintiff's valid and binding contract of employment, contrary to the restraint mandated by the Contract Clause of the United States Constitution, and in disregard of his rights under the First, Fourth, Fifth, Tenth and Fourteenth Amendments thereto, as well as his Civil Rights as asserted in Paragraph 1 hereof. The violations of said Defendants were in direct conflict with and disregard of Sec. 18-10A-3 of the School Laws of West Virginia requiring as a prerequisite for sharing in specified Federal financial grants, that a "merit system of personnel management" be at all times maintained.

18. By reason of the aforesaid, plaintiff has been damaged as will more particularly hereinafter be set out.

SECOND CAUSE OF ACTION

19. Plaintiff reasserts each and every of the averments of Paragraphs 1 through 18

of the within Complaint as if herein fully set out.

20. On September 1, 1973, in furtherance of their conspiratorial purposes, defendants did hold a sham formal "hearing" for the sole purpose of giving record appearance of affording plaintiff Constitutional due process. Contrary to the minimal rights of plaintiff, the said proceedings were completely bereft of basic legal and Constitutional requirements in that:

a. Plaintiff was denied a fair and impartial tribunal, in that President Siders who had participated in formulating the "charges" against plaintiff, and who consistently evidenced his bias and intent to effect plaintiff's dismissal, presided thereat.

b. For the apparent purpose of "making it legal", Defendant Siders permitted Defendant Donald C. Kingery, Esq., to dictate as well as to personally make rul-

ings thereat, contrary to law. All reasonable requests, objections and motions made on plaintiff's behalf were denied on direct orders of said Defendant Kingery. Such rulings and orders appear at Pages 7, 9, 22, 27, 32, 33, 37, 52, 50, 63, 64, 109, 135, 138, 147, 148, 190, 197, 237, 272, 273, 274, 276, 284, 287, 294, 342.

c. Although no person other than Defendants Villars and Preston signed "charges", and Villars was represented on the record by Carroll W. Casto, Esq., Defendant Kingery produced prosecuting witnesses on behalf of the Board supposedly sitting in judgment. Said Board witnesses were permitted to expand the "charges" without advance written notice to Plaintiff, and over proper objections.

d. Board Secretary and member Bill Withers observed that "this thing looks like it is pre-arranged" (p.23) after remarking as to the "facial gestures of Mr. Casto, Mr. Kingery and of the Board." He fur-

ther stated: " I mean just from the language that I am hearing and all the talking among yourselves and looking, you know I get the feeling that we are confronting a conspiracy."

e. Board witness Harbour admitted talking with Defendant Siders prior to the "hearing" at said defendant's house (p.168).

f. After 341 pages of confused record, counsel for plaintiff requested the privilege of filing a brief, presumably on transcription of the record, which request was denied (p.342) and in immediate "executive session", on motion of Defendant Brady, seconded by Defendant Adkins, plaintiff was found to have"committed acts of intemperance, cruelty, and willful neglect of duty" by the recorded votes of Defendants Brady, Adkins and Siders. Secretary Withers voted against the motion. By the same means and persons, plaintiff was dismissed from his position as principal of Hannan High School, and "the contract entered into between the Board of

cruelty and willful neglect of duty was arbitrary and capricious," ordering reinstatement of plaintiff to his position as Principal of Hannan High School, "with pay from the date of his dismissal by respondent board."

24. That defendants, persisting in their arbitrary, malicious and conspiratorial purposes, petitioned for certiorari to the Circuit Court of Kanawha County, West Virginia, reasserting that plaintiff was properly found guilty of "willful neglect of duty, intemperance and cruelty." That the learned Circuit Court refused certiorari on the ground of lack of jurisdiction; whereupon defendants did petition the Supreme Court of Appeals of West Virginia for certiorari and did, at 234 S.E.2d 321 (1977), obtain reversal of the Circuit Court on said jurisdictional ground; whereupon, on July 13, 1977, the said Circuit Court of Kanawha County, West Virginia, did issue certiorari as directed, and did hold preliminary hearing on August 29, 1977, but

has yet pending the matter therein.

25. That by maliciously, arbitrarily and falsely reasserting on record the unsupported and unsupportable charges impugning the character, reputation and competence of plaintiff personally and in his professional capacity, defendants have effectively deprived plaintiff of his good name, standing and acceptance in the State of West Virginia, and have prevented his employment for over five years to the date of this complaint in his professional work as an educator and principal for which he is especially qualified and certified; all without any cause on his part, and in blatant disregard and violation of his liberty interest including his right and opportunity to work, to associate with and be a member of educational societies, associations and institutions; and his likelihood of obtaining similar employment is in the circumstances totally non-existent. Further, plaintiff has at all times been and

still is a non-user of alcoholic beverages; but, nevertheless, the repeated malicious charge that he was "properly" found guilty of intemperance, as well as cruelty and willful neglect of duty labels him with such opprobrium as to foreclose his acceptance by students, parents and educators alike.

26 That the actions of defendants in refusing or failing to reinstate plaintiff in accordance with the Order of the Honorable Daniel B. Taylor, State Superintendent of Schools, pending review of the matters in the Courts of West Virginia, and in using such review procedures for republicising the libellous and vicious untruths concerning plaintiff put a chilling effect on the personal and professional protections of plaintiff and others guaranteed merit tenure, and intimidates professional employees in the schools of West Virginia in exercise of their functions, contrary to the Constitutional guarantees of freedom of speech and

the sincere and unhampered guidance of scholars in their right to non-political search for truth.

27. By reason of the foregoing plaintiff has been grossly and irreparably damaged, his contract of employment and his right to renewal thereof, together with the financial remuneration provided for therein, and the pension, vacation and advancement opportunities, inter alia, implicit therein have been lost to plaintiff, so as to entitle him to both compensatory and punitive damages as well as a just, fair and unbiased review of the record of his case.

FOURTH CAUSE OF ACTION

28. Plaintiff reasserts each and every of the averments of Paragraphs 1 through 27 of this Complaint as if herein fully set out.

29. That under the policy of the Federal law, the State of West Virginia did as-

sent to and accept the provisions of all laws of the United States for receiving financial grants for free schools, textbooks, "or any other educational purpose in local public school units, or for any other educational purpose". (School Laws of West Virginia, Sec. 18=10-8). Such assent and acceptance is binding on the Mason County Board of Education and its official counsel. That the established policy of Federal law is and has been that all persons are entitled to equal protection of the law, and to be free from discriminatory application thereof; a fortiori, are plaintiff and all others similarly situated entitled to their protection of their personal dignity, good name, reputation, right to work and to contract for their services, and to have their contract honored; and, in case of being put to trial by any public agency, such as a State constituted County Board of Education, plaintiff is by mandate of Federal law entitled

to due process, including a fair trial by a fair and impartial tribunal, upon only proper charges and notice in advance of hearing. That defendants denied to plaintiff all of his said Federally guaranteed rights, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and contrary to the statutory compact with the State of West Virginia as aforesaid, while accepting and disbursing substantial Federal grants thereunder.

30. That in addition to the great damage to his good name and his reputation, as well as his loss of contract and employment as hereinabove set forth, the actions of defendants have inflicted upon plaintiff extreme emotional and mental stress, humiliation, embarassment and suffering, all to his great hurt and damage.

31. That the conspiratorial purpose of the defendants has been fulfilled by the appointment of Richard Haycraft as Principal of Hannan High School, which position he is

now occupying.

32. That the relationship of the Mason County Board of Education, a statutory educational corporation, and Defendants Siders, Adkins and Brady as officers thereof, and the relationship of Defendant Donald C. Kingery, Esq., as Prosecuting Attorney for Mason County, West Virginia, to the matters complained of were all under color of public offices of the State and County as aforesaid; but the relationship of said public officers with the private citizen defendants, Villars and Preston has been interdependent, joint and symbiotic so as to constitute them joint participants in the unlawful acts committed under color of public state and county offices as aforesaid, resulting in the deprivations of plaintiff's Constitutional and Federally guaranteed rights, to his great hurt and damage.

33. That all of the defendants did at all times pertinent, act in extreme bad faith and with a combined purpose of wrongfully and illegally and arbitrarily using

their respective public offices under the laws of West Virginia for the purpose and with the intent of depriving plaintiff of his property and contract rights in his employment and in his good name, reputation and community standing.

34. By reason of the actions of defendants, plaintiff has been deprived of his position as Principal of Hannan High School, which position was assured to him by valid, written contract and law, as well as right of renewal of said contract for his work expectancy in future. The reasonable compensatory value of his said rights, past and future, is in excess of Two Hundred and Fifty Thousand Dollars ($250,000.00). That in addition, plaintiff has been otherwise damaged in his good name, reputation, community standing and acceptance and his liberty interest in a minimum of Two Hundred and Fifty Thousand Dollars ($250,000.00). By reason of the evil, conspiratorial, arbitrary and illegal

manner in which plaintiff has been injured, plaintiff demands punitive damages in an amount equal to his compensatory damages.

WHEREFORE, plaintiff demands of defendants damages, both compensatory and punitive in each Cause of Action in excess of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

A jury trial is demanded.

/s/ Donald R. Wilson

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Charleston, West Virginia 25329
Attorney for Plaintiff

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FORM 31

STATE OF WEST VIRGINIA
DEPARTMENT OF EDUCATION:

ST. Inc.
9471.00
832.10
11910.60

TEACHER'S PROBATIONARY CONTRACT OF EMPLOYMENT

THIS CONTRACT OF EMPLOYMENT, made and entered into the 27 day of July, 19 72, by and between THE BOARD OF EDUCATION OF THE COUNTY OF Mason, State of West Virginia (hereinafter called Board), party of the first part, and

Bright McCausland
(Name of Teacher)

of Point Pleasant (Post Office) Mason (County) W.Va. (State), a teacher holding a Principals Certif. (Kind of Certificate or Permit) teacher's certificate or permit issued under the laws of the State of West Virginia, and now in force (hereinafter called Teacher), party of the second part:

WHEREAS, at a lawful meeting of the Board of Education of the said County of Mason held at Point Pleasant, on the 27 day of July, 19 72, the Teacher was duly appointed for employment as Principal in the public schools of said Mason County, at a salary for the school employment term beginning on or after the first day of ~~July~~ Aug. 19 72 of $11,910.60 Annual Salary ($_____) per month for the 19 72 -19 75 school term. This contract shall be for (_____), (_____), or (X) school terms, and
(one) (two) (three)

WHEREAS, Section 2, Article 2, Chapter 18A of the Code of West Virginia, as last amended, provides, among other things, that before entering upon their duties all teachers shall execute a contract with their boards of education, in the form prescribed by the state superintendent of schools, and that every such contract shall be signed by the teacher and by the president and secretary of the board of education; and

WHEREAS, this contract is in the form prescribed by the state superintendent of schools:

NOW, THEREFORE, THIS CONTRACT WITNESSETH:

That pursuant to said appointment and in consideration of the said monthly salary to be fixed and paid by the Board for the said school term in the manner and at the times prescribed by law, the Teacher agrees faithfully to perform all the duties of said position and employment, and agrees faithfully to observe and enforce the rules and regulations lawfully prescribed by legally constituted school authorities insofar as such rules and regulations may be applicable to said county.

THE PARTIES HERETO MUTUALLY AGREE:

(a) The services to be performed hereunder by the Teacher are to commence with the teacher's employment term beginning on or after the first day of July, 19 ....., and are to be performed in such school or schools, and at such place or places as may be designated by the Superintendent, with the approval of the Board.

EXHIBIT I

(b) The length of the school term is to be fixed by the Board pursuant to law.

(c) This contract is made subject to the authority of the board of school finance to require a county board of education not to contract for the employment of a teacher at a monthly salary in excess of the monthly salary fixed by Section 2, Article 4, Chapter 18A of the Code of West Virginia, as last amended.

(d) The services to be performed by the Teacher shall be such services as are required by law, by the lawful rules and regulations of the state board of education and by the lawful rules and regulations of the Board.

(e) The services to be performed under this contract shall commence on the date herein specified, and should the school in which the Teacher is employed be closed temporarily for necessary repairs, or because of the destruction of the building in which such school is conducted, school shall be suspended accordingly until necessary quarters are provided, but any such suspension shall not in any manner affect the employment term of such school, and quarters shall be provided without unnecessary delay, and, in any event, in time to complete the employment as provided by law.

(f) In event an elementary school is closed during the school term pursuant to code 18-5-13(3), if the teachers are not transferred or reassigned, they shall receive one month's salary according to law.

(g) The school in which the Teacher is employed may be recessed for such times and for such periods as may be mutually agreed upon from time to time.

(h) The salary for the last month's services rendered in any school year shall not be paid until the Teacher shall have made all reports and performed all duties lawfully required of the Teacher within the period of the school year.

(i) This contract may be terminated at any time by mutual consent of the Board and the Teacher.

(j) The power of the Board to suspend or dismiss the Teacher for immorality, incompetency, cruelty, insubordination, intemperance, or wilful neglect of duty, in pursuance of the provisions of Section 8, Article 2, Chapter 18A, Code of West Virginia, is in no manner impaired or affected.

(k) In the event the Teacher should fail to fulfill this contract, unless prevented from so doing by personal illness or other just cause, or unless released from this contract by the Board, or if the Teacher shall violate any lawful provision hereof, the Teacher shall be disqualified to teach in any other public school in the state for the period of the school year next ensuing and his credentials may be held for that period of time, according to law.

(l) The marriage of the Teacher shall not be considered a failure to fulfill this contract, or to be a violation thereof.

(m) In the construction and operation of this contract of employment, it shall at all times be subject to any and all laws now existing or that may hereafter be lawfully enacted relating to the fixing of the salaries of teachers, the increase or decrease of such salaries and the length of the school term.

(n) This contract shall terminate if at the beginning of any school term the Teacher does not hold a valid teacher's certificate covering the period of such term; provided that if a teacher is employed on good faith on the anticipation that he is eligible for a certificate and it is later determined after he has actually begun teaching that he was not eligible, the State superintendent of schools may authorize payment by the county board to the teacher for the time taught not to exceed three months.

(o) The operation of this contract shall be suspended for such period or periods of time as the Teacher, by reason of prolonged personal illness, may be unable to perform the duties herein required of the Teacher.

(p) In the construction and operation of this contract of employment, if the contract as indicated on page one is for a period of two or three years, the Teacher may, from year to year, or from time to time, be assigned to

other and different positions in the same school, or to other and different positions in other and different schools and that, in any such event, the salary of the Teacher may be increased or decreased, in accordance with changes in the kind of position or changes in the kind of duties but must be notified on or before the first Monday in May.

(q) This contract is not a continuing contract and shall be applicable only to a person not presently holding a continuing contract with this Board.

(r) If this contract, as indicated on page one, is for a period of two or three years, the salary for the second and third years shall be in conformance with Section 2, Article 4, Chapter 18A of the Code of West Virginia, as last amended; plus any local salary schedule in excess of minimum salaries that may be adopted by the county board of education.

WITNESS the following signatures as of the day, month and year first above written.

Theodore R. Stevens
President County Board of Education

Charles Withers
Secretary County Board of Education

Dwight McCausland
Teacher

The foregoing form is prescribed in pursuance of one of the provisions of Section 2, Article 2, Chapter 18A of the Code of West Virginia, as last amended.

David B. Tyler
STATE SUPERINTENDENT OF SCHOOLS

STATE OF WEST VIRGINIA
DEPARTMENT OF EDUCATION
CHARLESTON

TEACHER'S OATH

STATE OF WEST VIRGINIA

Mason County, to-wit:

I Bright McCausland, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of West Virginia, and that I will honestly demean myself in the teaching profession, and that I will to the best of my ability execute my position of teacher.

Bright McCausland, Teacher

Taken, subscribed and sworn to before me, a notary public (or) a member of the board of education, of said county, in my said county, this 8 day of August, 1972.

Jean L. Taylor
Notary Public
Member of the Board of Education
(Strike out inapplicable description of office, so as to show official capacity of officer.)

My commission expires October 7, 1978.

EXHIBIT I

Sec. 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c.646, 62 Stat. 944.

28 U.S.C. Sec. 1652

Sec. 1988 Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of the chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extebded to and govern the said courts

in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. As amended, Pub. L. 94-559, Ssc. 2, Oct. 19, 1976, 90 Stat. 2641.

42 U.S.C.A. Sec. 1988

Sec. 2072 Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular

session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede,or repeal any such rules heretofore prescribed by the Supreme Court. 28 U.S.C.A. Sec. 2072

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Sec. 1981

R.S. § 1977.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. Sec. 1982

R.S. § 1978.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979. **42 U.S.C. Sec. 1983**

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980. **42 U.S.C. Sec. 1985**

Sec. 55-2-6. Actions to recover on award or contract other than judgment or recognizance.

Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: If the casebe upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer, within ten years; if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be

upon any other contract, express or implied, within five years, unless it be an action by one party against his copartner for a settlement of the partnership accounts; or upon accounts concerning the trade or merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after. (Code 1849, c.119 Sec.5; Code 1860, c.149, Sec. 5; 1869, c.184, Sec.5; Code 1868, c.104, Sec.6; 1882, c.102, Sec.6; 1895,c.2 Sec.6; Code 1923, c.104,Sec.6.).

Opposition

Office - Supreme Court, U.S.
FILED
NOV 13 1981
ALEXANDER L. STEVAS
CLERK

No. 81-345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BRIGHT MCCAUSLAND,
Petitioner,

vs.

MASON COUNTY BOARD OF EDUCATION, a corporation: HARRY SIDERS, individually and as President of said corporation: BILL BRADY and ROBERT ADKINS, individually and together with Harry Siders, constituting a majority of said Board of Education; DONALD C. KINGERY, ESQUIRE, individually and as counsel for said corporation as well as Prosecuting Attorney in Mason County, West Virginia; and WALTER VILLARS, and NELLIE PRESTON,
Respondents.

ON PETITION FOR CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OPPOSING PETITION FOR CERTIORARI

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IN THE

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Respondents.

ON PETITION FOR CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OPPOSING PETITION FOR CERTIORARI

ARGUMENT

THE COURT OF APPEALS BELOW CORRECTLY DETERMINED THAT WEST VIRGINIA'S TWO-YEAR STATUTE OF LIMITATIONS FOR ACTIONS FOR DAMAGES FOR PERSONAL INJURIES WAS THE MOST APPROPRIATE STATE PERIOD OF LIMITATIONS FOR A CIVIL RIGHTS ACTION INSTITUTED UNDER 42 U.S.C. §§ 1981, 1982, 1983, and 1985.

This is a civil rights case arising from the Mason County Board of Education's discharge of Bright McCausland from his position as a high school principal on September 1, 1973. The petitioner filed his complaint in the United States District Court for the Southern District of West Virginia on December 7, 1978, alleging causes of action under 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 for the alleged violation of various federal constitutional rights caused by the respondents in discharging McCausland on September 1, 1973 and, apparently, in seeking a judicial review by writ of certiorari of an administrative decision in McCausland's case dated April 4, 1974.

The District Court below dismissed McCausland's civil action for the reason that all causes of action except under 42 U.S.C. 1986 were barred by the two-year provision of the West Virginia statute of limitations for personal actions for which no limitation is otherwise prescribed, West Virginia Code § 55-2-12, and that any alleged cause of action under 42 U.S.C. § 1986 was barred by that statute's own one-year limitation. The dismissal by the District Court was affirmed by the United States Court of Appeals for the Fourth Circuit. *McCausland* v. *Mason County Board of Education,* 649 F.2d 278 (4th Cir. 1981). It is from this decision of the Fourth Circuit

Court of Appeals that the petitioner seeks a writ of certiorari from this Court.

The issue presented by the petition for writ of certiorari is whether a state statute of limitations for personal injury and tort actions is the most appropriate period of limitations for federal civil rights actions allegedly arising under 42 U.S.C. §§ 1981, 1982, 1983, and 1985 because of a discharge from employment when there is no specific state statute of limitations for statutory causes of action.

Since there is no specifically stated or otherwise relevant federal statute of limitations for causes of action arising under 42 U.S.C. §§ 1981, 1982, 1983, and 1985, the controlling period will be the most appropriate one provided by state law. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975); see also, *Runyon* v. *McCary*, 427 U.S. 160, 49 L.Ed.2d 415, 96 S.Ct. 2586 (1976).

The District Court below determined the statute of limitations found in West Virginia Code § 55-2-12 to be the most appropriate period provided by state law. West Virginia Code § 55-2-12 provides:

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

McCausland, however, argues that the ten-year period of limitations found in West Virginia Code § 55-2-6 should be applied in this case; this statute provides:

> Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: If the case be upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer, within ten years; if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be upon any other contract, express or implied, within five years, unless it be an action by one party against his copartner for a settlement of the partnership accounts, or upon accounts concerning the the trade or merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after.

Before its consideration of this case, the Fourth Circuit Court of Appeals had addressed the question of the most appropriate statute of limitations for federal civil rights actions in a number of cases originating from Virginia. It has been that Court's analysis that a violation of one's constitutional rights results in a personal injury and, hence, Virginia's two-year statute of limitations for "every action for personal injuries" is the most appro-

priate period of limitation for federal civil rights actions arising from that State.

In *Almond* v. *Kent*, 459 F.2d 200 (4th Cir. 1972) the Court stated, after considering the nature of the wrong proscribed by § 1983, "in the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries." *Id.* at 204. The Court concluded that Virginia's two-year statute of limitations for "every action for personal injuries" was, therefore, the most appropriate period of limitation for actions under 42 U.S.C. § 1983. Likewise, in *Allen* v. *Gifford*, 462 F.2d 615 (4th Cir. 1972) the same two-year period of limitation was applied to an action under 42 U.S.C. § 1982 inasmuch as "both § 1982 and § 1983 were enacted to redress the infringement of civil rights" and "both allow the recovery of damages for personal wrongs." *Id.* at 615. The same two-year statute of limitation for every action for personal injuries was also applied to actions under 42 U.S.C. § 1981 in *Williams* v. *Norfolk and Western Railway Co.*, 530 F.2d 539 (4th Cir. 1975), and *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). In both *Williams* and *Patterson*, there were allegations of discrimination in the respective plaintiff's employment where collective bargaining agreements were involved.

The vitality of these decisions was reaffirmed in *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978) wherein the Court refused to apply a recently enacted one-year Virginia statute of limitations applicable only to federal civil rights actions. In *Johnson* the Court stated it could find no rational basis for distinguishing between the constitutional tort remedies embodied in 42 U.S.C. § 1983 and actions for injury to the person in light of the purposes for which statutes of limitations are generally prescribed.

In the decision below, the Fourth Circuit Court of Appeals determined that the West Virginia statute prescribing a two-year period within which to bring personal actions for damages for personal injuries is, for such federal civil rights actions, likewise the most appropriate one provided by state law. West Virginia has no period of limitations applicable to statutory causes of action or to federal civil rights actions.

Once actions under Sections 1981, 1982, 1983, and 1985 of Title 42 of the United States Code are determined to be constitutional torts for the redress of personal wrongs or injuries, there is no more appropriate West Virginia Statute of limitations than that found in West Virginia Code § 55-2-12.

The conclusion of the Court of Appeals for the Fourth Circuit that violations under 42 U.S.C. §§ 1981, 1982, 1983, and 1985 are tortious in nature and that, therefore, the forum state's tort or personal injury statute of limitations is the most appropriate period of limitation is strongly supported by consistent decisions from the Courts of Appeals for the First, Second, Fifth, Sixth, and Seventh Circuits.

In *Graffals* v. *Garcia,* 550 F.2d 687 (1st Cir. 1977) the Court held that a discharged employee's civil rights action claiming he was fired for political reasons sounded in tort and not in contract and, therefore, Puerto Rico's one-year tort statute of limitation was more appropriate than its fifteen-year period of limitations for contract actions. See also, *Ramirez de Arellano* v. *Alvarez de Choudens,* 575 F.2d 315 (1st Cir. 1978). In reaching this conclusion, the First Circuit Court of Appeals relied in part upon Dean Prosser's analysis that violation of duties of conduct imposed by the law which are based

primarily upon social policy sound in tort and not in contract. See, Prosser, *Law of Torts*, § 92 (4th Ed. 1971).

The Second Circuit Court of Appeals determined that Connecticut's three-year general tort statute of limitations was most appropriately applied in *Williams* v. *Walsh*, 558 F.2d 667 (2nd Cir. 1977) where a policeman sought relief under 42 U.S.C. § 1983 after his discharge.

The Fifth Circuit Court of Appeals in *Ingram* v. *Steven Robert Corporation*, 547 F.2d 1260 (5th Cir. 1977) affirmed the dismissal of a discharged employee's civil rights action under 42 U.S.C. § 1981 seeking reinstatement and back wages for the reason that the action was time-barred. The Court reasoned that since the assertion of rights under § 1981 and the fourteenth amendment arose from a statutory duty independently of any agreement between the plaintiff and his employer, the action was *ex-delicto* and application of Alabama's one-year statute of limitations for actions for any injury to the person or rights of another not arising from a contract or otherwise enumerated was more appropriate than its three-year period of limitations on written contracts or its six-year period on implied contracts. In a civil rights action under 42 U.S.C. § 1983 claiming wrongful discharge, the same Court in *Boshell* v. *Alabama Mental Health Board*, 473 F.2d 1369 (5th Cir. 1973) characterized the gravamen of the complaint as being interference with a constitutionally protected right and not the breach of a contractual obligation and, therefore, applied Alabama's statute of limitation for injuries to the person or rights of another rather than the period applicable to contractual claims.

In *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969) where a police officer had instituted an action under 42

U.S.C. § 1983 claiming he had been wrongfully demoted, the Court of Appeals for the Sixth Circuit first determined the nature of the plaintiff's claim and stated "Appellant, in seeking redress for a denial of equal protection under the Fourteenth Amendment, is complaining of a tortious invasion of his right to pursue his chosen profession." *Id.* at 566. Then the Court examined the nature of an action under § 1983 and held that its essence was ". . . a claim to recover damages for injury wrongfully done to the person." *Id.* at 567. The Court then concluded that Michigan's three-year statute of limitations for "actions to recover damages for injuries to person or property" was the most analogous to actions under § 1983. See also, *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) [application of same Michigan statute of limitation to actions under 42 U.S.C. § 1981 and 1985 (3)].

In *Movement for Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980) the Court of Appeals for the Seventh Circuit applied Indiana's two-year tort statute of limitation (rather than its six-year contract period or fifteen-year residuary statute) to a civil rights action under 42 U.S.C. § 1981 alleging racial and sexual discrimination in employment because the alleged damage was due to a violation of plaintiff's personal rights and not to a breach of a contractual obligation.

The Court of Appeals for the Tenth Circuit, however, has applied Colorado's six-year limitation period for actions arising out of contracts to federal civil rights actions under 42 U.S.C. §§ 1981 and 1983. *Brogan* v. *Wiggins School District*, 588 F.2d 409 (10th Cir. 1978) and *Zuniga* v. *Amfac Foods, Inc.*, 580 F.2d 380 (10th Cir. 1978).

Federal civil rights cases arising from Pennsylvania must be analyzed with the understanding that the federal courts in Pennsylvania are very much divided on the types of state actions which are governed by each of the available statutes of limitation. Compare, *Meyers* v. *Penneypack Woods Home Ownership Association,* 559 F.2d 894, 900 (3rd Cir. 1977) and *Black Grievance Committee* v *Philadelphio Electric Company,* 79 F.R.D. 98, 113 (E. D.Pa 1978).

In summary, it is to be observed that most of the federal decisions considering the issue have analyzed the nature of a civil action arising under 42 U.S.C. § 1981, 1982, 1983, and 1985 to be tortious in nature because actionable conduct of the defendants constitutes an interference with rights protected by the federal constitution. This analysis is consistent with that of Dean Prosser, who states:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law and, are based primarily upon social policy and not necessarily upon the will or intention of the parties. They may be owed to all those within the range of harm, or to some considerable class of people. Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to specific individuals named in the contract. Prosser, *Law of Torts,* § 92, at 613 (4th Ed. 1971).

The West Virginia cases cited by petitioner do not require application of West Virginia's statute of limitations for actions arising from breach of contract to peti-

tioner's complaint for denial of rights protected by the federal constitution. *Harrison* v. *Casto*, 271 S.E.2d 774 (W.Va. 1980) simply holds that an action for malpractice can be brought in tort or in contract. In *Cochran* v. *Appalachian Power Co.*, 246 S.E.2d 624 (W.Va. 1978) the West Virginia Court held that since the complaint should be construed as alleging either a cause of action in contract or a cause of action in tort, it would be construed to be in contract and the longer period of limitations for actions on contracts would apply.

The issue resolved by the West Virginia Court in *Cochran* is not germane to the issue presented by this petition for certiorari. McCausland's complaint cannot be construed to allege a cause of action for breach of contract and still have viability as a federal cause of action (there being no diversity between the parties).

A cause of action under the various civil rights statutes is of necessity grounded upon a denial of rights which arise from the federal constitution or certain federal statutes. Such an action is to redress a personal injury resulting from the denial of a right which is guaranteed to the particular plaintiff as an incident of his or her citizenship. It is, therefore, tortious in nature and the most appropriate period of limitation for the institution of such a civil action is determined by the forum state's statute of limitations for tort or personal injury.

In his complaint the petitioner alleged that the respondents violated various of his constitutional rights in causing his discharge on September 1, 1973, and in seeking judicial review in the Circuit Court of Kanawha County, West Virginia, from the administrative decision of the State Superintendent of Schools dated April 4, 1974. Therefore, under the guidelines of *Delaware State College* v. *Ricks*, 449 U.S._____, 66 L.Ed.2d 431, 101

S.Ct. 498(1980), the Circuit Court of Appeals below correctly determined that Mr. McCausland's claims were time-barred, he not having filed his complaint until December 7, 1978.

CONCLUSION

Causes of action properly alleged under 42 U.S.C. §§ 1981, 1982, 1983, and 1985 are based upon a defendant's interference with plaintiff's constitutional and statutory rights which exist as a matter of law and not because of any consensual arrangement between plaintiff and defendant. Such an interference with a plaintiff's personal rights results in a personal injury and is tortious in nature. Therefore, the time for institution of a civil rights action in the State of West Virginia under these civil rights statutes is most appropriately limited by West Virginia's two-year statute of limitations for personal actions for damage for personal injuries (West Virginia Code § 55-2-12).

Since the only overt actions by various of the defendants which McCausland alleges to have been wrongful are plainly alleged in the complaints to have occurred during and prior to 1974, the Courts below correctly ruled that McCausland's complaint was barred by West Virginia's statute of limitations. Accordingly, the action below of the United States Court of Appeals for the Fourth Circuit was plainly correct and the petition for certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-345

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BRIGHT McCAUSLAND, Petitioner

v.

MASON COUNTY BOARD OF EDUCATION, a corporation; HARRY SIDERS, individually and as President of said corporation; BILL BRADY and ROBERT ADKINS, individually and together with Harry Siders constituting a majority of said Board of Education; DONALD C. KINGERY, ESQ., individually and as counsel for said corporation as well as prosecuting attorney in Mason County, West Virginia; and WALTER VILLARS and NELLIE PRESTON,

Respondents

On Petition for Certiorari From
The United States Court of Appeals
For The Fourth Circuit

PETITIONER'S REPLY BRIEF

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On Petition for Certiorari From
The United States Court of Appeals
For The Fourth Circuit

PETITIONER'S REPLY BRIEF

A R G U M E N T

I.

RESPONDENTS IMPROPERLY AND UNTIMELY ATTEMPT TO HEREIN RAISE A QUESTION AS TO SUFFICIENCY OF THE COMPLAINT, NOT HAVING APPEALLED FROM EITHER THE JUDGMENT OF THE DISTRICT COURT UPHOLDING SUFFICIENCY, OR FROM THE AFFIRMATION OF SAID JUDGMENT BELOW

As has been fully set out in the Reason No. 3 for Allowing of the Writ of Certiorari, in pages 40 through 45 of the Petition, although no appeal was taken by the respondents from the specific adjudication by the District Court upholding the sufficiency of the Complaint, the Court of Appeals, albeit affirming the Judgment of the District Court, in its Opinion in effect (at page 55 of the Petition) holds that the Complaint is insufficient under federal requirements. Now, given the opportunity of filing an out-of-time Brief Opposing the Petition for Certiorari, and without leave to do so, respondents expand on the implication of the Court of Appeals by injecting the issue of sufficiency of the Complaint, asserting (at page 10 of their Brief Opposing Petition For Certiorari) the following:

> "McCausland's Complaint cannot be construed to allege a cause of action for breach

> of contract and still have viability as a federal cause of action (there being no diversity between the parties)."

It is respectfully suggested that even though the said argument is faulty, presuming the necessity of diversity for all civil rights actions asserted pursuant to 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331 for remedies assured by 42 U.S.C. §§ 1981, 1982, 1983, etc.; nevertheless, the argument is directed to an issue not properly brought up for review herein. The sole issue raised by both the appeal below and by the Petition for Certiorari herein is the propriety of application of the general "ad hoc" rule of the United States Court of Appeals For The Fourth Circuit (hitherto adopted for Virginia civil rights cases, there having been no Virginia state court decisions or statutes determinative of the proper state statute of limitations governing such cases in the United States Courts)

to a civil rights action brought in the United States District Court for Southern District of West Virginia, wherein the Supreme Court of Appeals has clearly defined the applicability of its tort and contract (or mixed) statutes of limitations; which definitions are contrary to the "ad hoc" rule of the Circuit prevailing in Virginia. Moreover, the said "ad hoc" Fourth Circuit rule was never applied by it in contract cases even in Virginia.

The argument stating more fully the Petitioner's view on the insinuated "issue" as to the sufficiency of the Complaint is contained in the Petition and will not here be repeated, except in the nature of objecting thereto in the Brief Opposing Petition For Certiorari.

II.

RESPONDENTS IMPROPERLY, AND WITHOUT JUDICIAL WARRANT SUPPORTING SUCH IMPLICATION, PRESUME TO NARROWLY RESTRICT THE HOLDINGS OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IN

COCHRAN v. APPALACHIAN POWER CO. AND HARRISON v. CASTO

It is assumed that respondents overlooked a typographical error on page 10 of their Brief where it is, as standing, a substantional misstatement of the holding of the West Virginia Supreme Court of Appeals in Cochran v. Appalachian Power Co., 246 S.E. 2d 624 (1978), that:

> "the West Virginia Court held that since the complaint <u>should</u> be construed as alleging either a cause of action in contract or a cause of action in tort, it would be construed to be in contract and the longer period of limitations for actions on contracts would apply."

In fact the Supreme Court of Appeals plainly stated:

> " a complaint that <u>could</u> be construed as being either in tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limi-

tation if construed as being in tort."

It is thus seen that the Court's determination as to the application of the contract statute of limitations in West Virginia was not intended to be confined to the Cochran case on a judicial finding that in that isolated case the complaint "should" be construed as being on contract. When, in 1980 the Supreme Court of Appeals in Harrison v. Casto, 271 S.E.2d 774 again applied the general principle of Cochran, supra, it reaffirmed its intent to save all actions which involve contract rights, and wherein the nature of the violations thereof constitute torts, such aggravated violations will not rob the plaintiff of the broader contract protections under the more liberal statutes of limitations applicable thereto.

Both Cochran and Harrison are discussed more fully at pp. 26-27 of the Petition for Certiorari.

III.

RESPONDENTS' BRIEF DOES NOT CITE A SINGLE CASE WHEREIN A WEST VIRGINIA STATE COURT HAS IN ANY WAY NARROWED OR MODIFIED THE PRINCIPLE DECLARED IN COCHRAN v.APPALACHIAN POWER CO. ANENT APPLICABILITY OF THE STATE CONTRACT STATUTE OF LIMITATIONS

IV.

RESPONDENTS' BRIEF DOES NOT CITE A SINGLE CIVIL RIGHTS CASE ASSERTING ARBITRARY AND ILLEGAL BREACH OF A PUBLIC EMPLOYEE'S WRITTEN CONTRACT WITHOUT DUE PROCESS OF LAW, WHEREIN A "PERSONAL INJURY" TORT STATUTE OF LIMITATIONS WAS UPHELD AS A BAR THERETO

V.

NONE OF THE CASES CITED BY RESPONDENTS, INCLUDING THE VIRGINIA CASES DECIDED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, ARE APPOSITE HEREIN

Allen v. Gifford, 462 F.2d 615, (4th Cir. 1972) was a Virginia § 1982 civil rights claim by a black plaintiff against a private property owner who allegedly refused to sell a house to him solely on the basis of his race. No contract was involved. No governmental agency was involved.

Almond v. Kent, 459 F.2d 200 (4th Cir. 1972) was a prisoner's § 1982 action

against several officers who allegedly subjected the plaintiff to personal abuses and humiliation during his imprisonment;

Discriminatory discharge from employment for claimed exercise of freedom of speech offensive to their employer, was the essential nature of the following case:

Boshell v. Alabama Mental Health Board, 473 F.2d 1369 (5th Cir. 1973);

In Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973), religious discrimination in promotions and in assigning overtime work was claimed;

Johnson v. Davis, 582 F.2d 1316 (4th Cir.), was another prisoner's claim charging personal abuse while in custody;

Board of Regents v. Tomanio, 446 U.S. 478, 64 L.Ed. 2d 440, 100 S. Ct.1790 (1980) involved neither a public employee nor unlawful breach of a public employment contract. The plaintiff charged discriminatory refusal of waiver of licensing requirement for practicising chiropractics.

Racial discrimination in private employment (no contract involved) was the subject matter of the actions in:

Ingram v. Steven Robert Corp. 547 F.2d 1260 (5th Cir. 1977;

Movement for Opportunity and Equality, etc. v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980);

Patterson v. American Tobacco Co., etc., 535 F.2d 257 (4th Cir. 1976);

Williams v. Norfolk & W. Ry., 530 F.2d 539 (4th Cir. 1975)

Alleged political discrimination was the basis of the claims in the following cases, where no contract was involved:

Ramirez de Arellano v. Alvarez De Choudens, 575 F.2d 315 (1st Cir. 1978);

Graffals Gonzalez v.Garcia Santiago, 550 F.2d 687 (1st Cir. 1977);

Alleged racially motivated discharge from employment where no contract was involved, was asserted in the following:

Madison v. Wood, 410 F.2d 564 (6th Cir. 1969;

Johnson v. Railway Express Agency, 421 U.S. 454, 44 L.Ed.2d 295, 95 S. Ct. 1716 (1975)

It is difficult to conceive how the respondents concluded that "under the guidelines of Delaware State College v. Ricks, 449 U.S.____, 66 L.Ed.2d, 101 S.Ct. 498 (1980), the Circuit Court of Appeals below correctly determined that Mr. McCausland's claims were time-barred."

Ricks, a black Liberian college professor had been formally notified in writing in unquestionably ample time prior to the termination date of his one-year contract that he was not granted tenure by the trustees, but would be offered a one-year "terminal" contract, which he accepted, thereby formally agreeing to termination. Belatedly he filed a Title VII claim of discrimination. In footnote 5(2b) on page 438 of 66 L.Ed.2d, it is stated: "The par-

ties in this case agree that the applicable limitations period under Delaware law is three years." The letter notifying Rick of refusal of tenure was delivered in March, 1974. His lawsuit was filed September 9, 1977.

Rick did not involve a valid, subsisting contract; no breach of contract was claimed by him; his Title VII procedure was admittedly belated.

Counsel for petitioner confesses that any similarity of the Ricks case with this McCausland complaint escapes his discernment.

CONCLUSION

Admittedly the breach of the public employment contract here involved was also tortious in nature. West Virginia will not reward the tort-feasor violators in such cases with a waiver of liability for the limitation of action statutorily applicable for the breach of contract. The respondents

take comfort in the Fourth Circuit's willingness to extend its Virginia "ad hoc" rule to overrule the law of West Virginia. That rule in effect honors the breach because of the resourcefulness of the tort-feasors in adding tortious conduct thereto. Petitioner respectfully asks that rather than the breach, the public contract and the Contract Clause of the Constitution be here honored.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of the foregoing Reply Brief of Petitioner by direct mail, postage prepaid, upon all record counsel for respondents listed below, this 19th day of November, 1981:

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